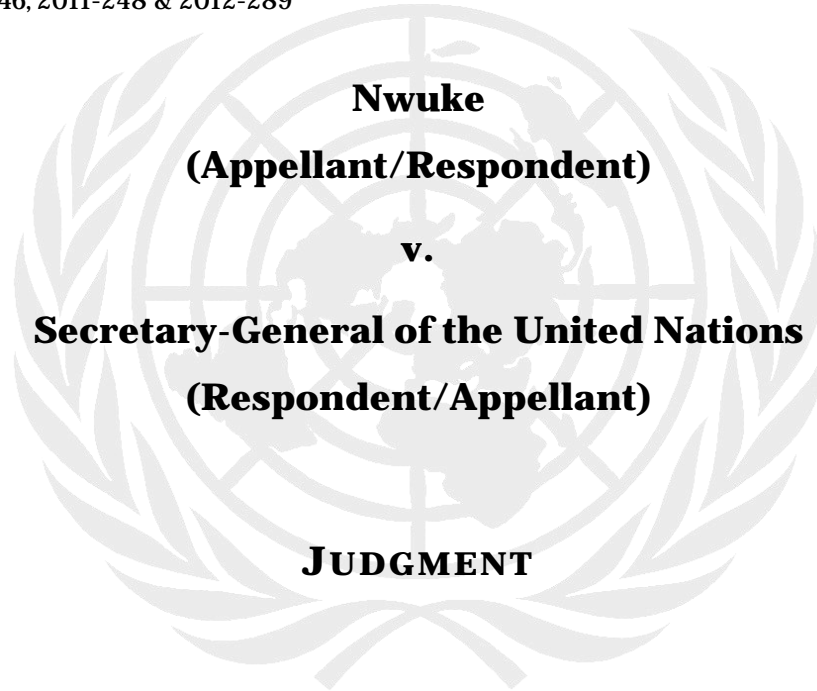




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case Nos. 2011-246, 2011-248 & 2012-289



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

JUDGMENT

Before: Judge Sophia Adinyira, Presiding
Judge Inés Weinberg de Roca
Judge Jean Courtial

Judgment No.: 2012-UNAT-230

Date: 29 June 2012

Registrar: Weicheng Lin

Counsel for Appellant/Respondent: Self-represented

Counsels for Respondent/Appellant: Rupa Mitra/Amy Wood/Stéphanie Cartier

JUDGE SOPHIA ADINYIRA, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by the Secretary-General of the United Nations against Order No. 081 (NBI/2011) and two appeals filed by Mr. Kasirim Nwuke against Order No. 101 (NBI/2011) Judgment No. UNDT/2012/002.

Synopsis

2. Under Article 2(2) of the Statute of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), decisions of the UNDT on applications to suspend the implementation of administrative decisions are not subject to appeal.

3. The Secretary-General has however filed such an appeal and submits that the appeal is receivable as the UNDT exceeded its jurisdiction in issuing Order No. 081.

4. This Court has consistently held that generally only appeals against final judgments are receivable. Appeals against interlocutory decisions, however they may be named by the Dispute Tribunal, will not be receivable save in exceptional cases where the Dispute Tribunal has clearly exceeded its jurisdiction or competence.¹

5. The Secretary-General appeals a suspension order of an administrative decision, and submits that the appeal is receivable as the UNDT exceeded its jurisdiction when it ordered suspension of a contested decision without making a finding as to whether the requirements for suspension action under Article 2(2) of the UNDT Statute have been met. The Secretary-General further submits that the Dispute Tribunal may not suspend an administrative decision in order to determine, at a later stage, whether the requirements for such suspension were satisfied.

6. We think otherwise, as in *Villamorán* this Court ruled:

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 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 for action for these five days. To find otherwise

¹ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062 (Full bench, Judge Boyko dissenting).

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.²

7. In the present case, the Dispute Tribunal extended the suspension until 17 August 2011 when the oral hearing was to be held. This was in excess of the period of five working days during which, in accordance with Article 13(3) of its Rules of Procedure, the Dispute Tribunal must consider an application for suspension of action.

8. The Dispute Tribunal clearly exceeded its competence and, therefore, the appeal against the impugned Order No. 081 is receivable and well founded.

9. The Order No. 081 is rescinded to the extent that it grants the suspension of the implementation of the contested administrative decision beyond 5 July 2011. Following upon that, the appeals against Order No. 101 and Judgment No. UNDT/2012/002 are rendered moot.

Facts and Procedure

10. Mr. Nwuke joined the Organization in 2001 and was at the material time Chief of Section at the P-5 level in the Office of Strategic Planning and Programme Management (OPM), Economic Commission for Africa (ECA), in Addis Ababa.

11. In February 2010, Mr. Nwuke applied for the D-1 post of Director, Regional Integration, Infrastructure and Trade Division (RIITD) (2010 RIITD post), ECA, but he was not selected. Mr. Nwuke requested management evaluation contesting his non-selection for the 2010 RIITD post. Not satisfied with the Secretary-General's response to his request for management evaluation, Mr. Nwuke filed a case with the UNDT, which is still pending.

12. In May 2011, the ECA Executive Secretary appointed Mr. Stephen Karingi as Officer-in-Charge for RIITD, following the redeployment of the incumbent. On 9 June 2011, ECA advertised the post of Director RIITD (2011 RIITD post), with a closing date of 8 August 2011.

13. On 13 July 2011, the ECA Executive Secretary announced that he had selected a roster candidate, Mr. Karingi, to fill the 2011 RIITD post, in compliance with Section 9.4 of ST/AI/2010/3 (Staff selection system). Mr. Karingi had applied for the 2010 RIITD post; he was

² *Villamorán v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160, para. 2.

not selected, but was rostered. Mr. Karingi was notified of the promotion decision and accepted the offer of appointment to the 2011 RIITD post on 13 July 2011.

14. On 27 July 2011, the ECA Executive Secretary announced to the ECA staff the appointment of Mr. Karingi to the 2011 RIITD post, effective 1 August 2011.

15. Also on 27 July 2011, in addition to a request for management evaluation contesting the decision to appoint Mr. Karingi as Director of RIITD, Mr. Nwuke filed an application with the UNDT for suspension of action on the implementation of the contested decision.

16. In Order No. 081 issued on 29 July 2011, the UNDT ordered that the contested decision be suspended “until 17 August 2011 when the oral hearing of the case will be held”, as it concluded that “there are many issues, both factual and legal required for a proper determination of the case”. The Secretary-General appealed that order on 15 August 2011. Mr. Nwuke answered on 7 September 2011. This is Case No. 2011-246.

17. In Order No. 101 issued on 17 August 2011 after a hearing of the parties, the UNDT rejected Mr. Nwuke’s application for suspension of action, as it “[did] not find that the contested decision appear[ed] to be unlawful”. Mr. Nwuke appealed on 18 August 2011. The Secretary-General answered on 14 September 2011. This is Case No. 2011-248.

18. In Judgment No. UNDT/2012/002 issued on 6 January 2012, the UNDT dismissed Mr. Nwuke’s application for suspension of action. The UNDT found it unfair that, while administrative instruction ST/AI/2010/3 imposed an obligation to advertise a job opening, it at the same time allowed the head of department to select a rostered candidate to fill the vacant position before the expiry of the deadline of the vacancy announcement. But the UNDT could not conclude that the exercise was unlawful. On 22 January 2012, Mr. Nwuke appealed. The Secretary-General answered on 9 March 2012. This is Case No. 2012-289.

Submissions

Case No. 2011-246

Secretary-General’s Appeal

19. The Secretary-General submits that his appeal of UNDT’s Order No. 081 is receivable, because the UNDT exceeded its jurisdiction in issuing the said Order to suspend the decision to

appoint Mr. Karingi without stating the reasons, facts and law on which the Order was based, or making any findings as to whether the requirements for suspension of action had been satisfied.

20. The Secretary-General avers that the UNDT exceeded its competence in ordering the suspension of a decision that had already been implemented and could no longer be suspended. In the present case, the selected candidate accepted and signed the offer of appointment on 13 July 2011. Mr. Nwuke submitted his application for suspension of action on 27 July 2011.

Mr. Nwuke's Answer

21. Mr. Nwuke submits that the Secretary-General's appeal from Order No. 081 is not receivable, because the contested decision had not yet been implemented. A selection decision is implemented only after all the suspensive conditions of the offer of appointment have been met including the assumption of the higher level functions by the selected candidate. That was not the case here. Mr. Nwuke applied for a suspension of action and Order No. 081 was issued before the effective date of promotion of the selected candidate on 1 August 2011. In Mr. Nwuke's view, a selection decision is not implemented before the final determination of the case on merits.

Case No. 2011-248

Mr. Nwuke's Appeal

22. Mr. Nwuke submits that UNDT's Order No. 101 is appealable, because the UNDT exceeded its competence and committed an error in procedure when it refused to allow him to argue his case fully and fairly in violation of his *audi alteram partem* rights. In his view, the errors made by the UNDT materially affected its decision.

Secretary-General's Answer

23. The Secretary-General submits that the UNDT properly dismissed Mr. Nwuke's application for suspension of action after it found that the contested decision did not appear to be unlawful. Thus Mr. Nwuke's application failed to meet one of the criteria set forth in the UNDT Statute and Rules of Procedure for the grant of suspension of action.

24. The Secretary-General maintains that Mr. Nwuke's challenge that he was not given a full and fair opportunity to present his case does not raise any question with respect to UNDT's

competency to issue the contested Order. The Secretary-General notes that Mr. Nwuke was not entitled to an oral hearing, though he had such an opportunity.

Case No. 2012-289

Mr. Nwuke's Appeal

25. Mr. Nwuke reiterates that the UNDT denied him the right to a full and fair hearing during the 17 August 2012 hearing. In addition, Mr. Nwuke stresses that the UNDT made factual errors by mischaracterizing his arguments in paragraph 18 of the Judgment and by failing to consider all the relevant facts before it.

Secretary-General's Answer

26. The Secretary-General submits that the present appeal is not receivable, as none of Mr. Nwuke's grounds of appeal falls within the narrow scope within which the Appeals Tribunal has permitted appeals of the UNDT's decisions on applications for suspension of action. Even if his claims of inaccuracies were established, they would not amount to a clear excess of competence by the UNDT to trigger the jurisdiction of the Appeals Tribunal.

Considerations

27. Under Article 2(2) of the UNDT Statute, decisions of the UNDT on applications to suspend the implementation of administrative decisions are not subject to appeal.

28. The Secretary-General has however filed such an appeal and submits that the appeal is receivable as the UNDT exceeded its jurisdiction in issuing Order No. 081.

29. This Court has consistently held that generally only appeals against final judgments are receivable. Appeals against interlocutory decisions, however they may be named by the Dispute Tribunal, will not be receivable save in exceptional cases where the Dispute Tribunal has clearly exceeded its jurisdiction or competence.³

³ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062 (Full bench, Judge Boyko dissenting).

30. In *Bali*,⁴ the Appeals Tribunal restated its position:

It emerges from its jurisprudence that, in the view of the Appeals Tribunal, the Dispute Tribunal clearly exceeds its competence when it takes decisions that are outside of the jurisdictional power vested in it by its Statute and by the inherent jurisdiction of any Tribunal adjudicating cases in a system of administration of justice consistent with the principles of rule of law and due process.

Thus, in precedents in which the Dispute Tribunal ordered suspension of the implementation of an administrative decision beyond the date on which the management evaluation is expected to be completed without respecting the limits of the competence conferred on it by Article 2(2) of its Statute, the Appeals Tribunal ruled that appeals against such orders were receivable and well founded.

Conversely, the Appeals Tribunal has held that the Dispute Tribunal has a broad discretion with respect to case management, and that it will not interfere lightly in the exercise of a jurisdictional power conferred on the first instance Tribunal for a fair and expeditious disposal of the case. That is why, in accordance with Articles 2(2) and 10(2) of the Statute of the Dispute Tribunal, appeals against interlocutory decisions are not receivable in matters of procedure, evidence and production of documents as well as those ordering interim measures, even if the first instance Judge had erred on a question of law or a question of fact on the application of the conditions for the grant of the suspension of action or on a question of procedure.

31. In the present case the Secretary-General submits that the UNDT exceeded its jurisdiction in ordering the suspension of a contested decision without making a finding as to whether the requirements for suspension action under Article 2(2) of the UNDT Statute had been met.

32. We note that the suspension of action was granted during the pendency of the management evaluation as Article 2(2) of the Statute of the Dispute Tribunal requires it, but the Judge fixed 17 August 2011 as the date for a hearing of the applications.

33. The Secretary-General submits that the Dispute Tribunal may not suspend an administrative decision in order to determine, at a later stage, whether the requirements for such a suspension were satisfied.

⁴ *Bali v. Secretary-General of the United Nations*, Judgment 2012-UNAT-244, paras. 9-11 (footnotes omitted).

34. We think otherwise, as in *Villamorán* this Court ruled:

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 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 for 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.⁵

35. In the present case, we note that the Dispute Tribunal did not respect the limit of five working days, but as stated in Order No. 081, extended the suspension until 17 August 2011 when the oral hearing was to be held. This was in excess of the five-working-day period during which, in accordance with Article 13(3) of its Rules of Procedure, the Dispute Tribunal must consider an application for suspension of action.

36. In so ruling, the UNDT took a decision outside of the jurisdictional power vested in it by its Statute and by the inherent jurisdiction of any Tribunal adjudicating cases in a system of administration of justice consistent with the principles of rule of law and due process.

37. It follows from the foregoing considerations that the Dispute Tribunal clearly exceeded its competence and, therefore, the appeal against the impugned Order No. 081 is receivable and well founded.

38. Order No. 081 (NBI/2011) is rescinded to the extent that it grants suspension of the implementation of the contested administrative decision beyond 4 August 2011. Following upon that, the appeals against Order No. 101 and Judgment No. UNDT/2012/002 are rendered moot.

Judgment

39. The appeal is allowed and Order No. 081 is hereby set aside. Mr. Nwuke's appeals from Order No. 101 and Judgment No. UNDT/2012/002 are rendered moot.

⁵ *Villamorán v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160, para. 2.

Original and Authoritative Version: English

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

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Courtial

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

(Signed)

Weicheng Lin, Registrar