



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

Case No. 2011-262



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

Judgment No.: 2012-UNAT-243

Date: 29 June 2012

Registrar: Weicheng Lin

Counsel for Appellee/Applicant: Seth Levine/Bart Willemsen

Counsel for Appellant/Respondent: Rupa Mitra

JUDGE JEAN COURTIAL, Presiding

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by the Secretary-General of the United Nations on 17 October 2011 against Judgment No. UNDT/2011/154 rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) sitting in Nairobi. On 8 December 2011, Ms. Nanci Hersh filed her answer.

Synopsis

2. This Court has consistently ruled that, in general, only appeals against judgments on the merits are receivable. Appeals against decisions taken during proceedings, regardless of what the UNDT may call them - order, judgment or something else - are receivable only in exceptional cases where the UNDT has manifestly exceeded its competence. It is evident from the jurisprudence of the Appeals Tribunal, however, that the UNDT has manifestly exceeded its competence when it takes decisions outside the jurisdiction conferred upon it by its Statute, and the inherent competence of any Tribunal charged with rendering justice in an administrative justice system governed by law and respect for the rights of the parties to the case.

3. When it ordered Ms. Hersh's application for a suspension of action to be transferred to the "general cause list" for a hearing on the merits and invited the parties to make submissions on the merits, the UNDT manifestly exceeded its jurisdictional power. The UNDT judgment is set aside.

Facts and procedure

4. Ms. Hersh joined the United Nations Mission in Sudan (UNMIS) in July 2005 as a Broadcast Technology Officer at the P-4 level. When the UNMIS mandate expired and the United Nations Mission in South Sudan (UNMISS) was created, a decision was taken to "transfer" some UNMIS staff members to UNMISS or the mission of the United Nations Interim Security Force for Abyei (UNISFA).

5. Ms. Hersh was not transferred to either of those Missions. On 27 July 2011, she received a letter of separation. On 12 August 2011, she filed a request for a management evaluation and on 23 August 2011, an application seeking suspension of the impugned administrative decision.

6. In UNDT Judgment No. UNDT/2011/154 of 31 August 2011, the Dispute Tribunal held that Ms. Hersh's application for a suspension of action should be refused on the grounds that it did not satisfy one of the three conditions required for granting it. The Dispute Tribunal nonetheless specified that the absence of one of those conditions did not extinguish the Applicant's cause of action where an unlawful

decision had been taken to her detriment, as in the case before it. The Dispute Tribunal, having judged that the impugned decision not to transfer Ms. Hersh from UNMIS to UNMISS was unlawful, ordered her application for a suspension of action to be transferred to the “general cause list” for a hearing on the merits. It further requested Ms. Hersh to file an exhaustive application on the merits within 28 days and the Respondent to file a comprehensive case and reply within 14 days from receipt of Ms. Hersh’s application.

Submissions

The Secretary-General

7. The Secretary-General submits that the Dispute Tribunal exceeded its competence by ordering a hearing on the merits when Ms. Hersh had not filed an application on the merits but had only requested a suspension of action on the contested decision until a management evaluation could be completed. The Secretary-General further submits that nothing in the Statute of the Tribunal authorizes it to convert an application for a suspension of action into an application on the merits and that it cannot invoke its rules of procedure to appropriate powers that are not set out in its Statute. In the view of the Secretary-General, once the application for a suspension of action was refused, the case should have been withdrawn until such time as Ms. Hersh submitted an application on the merits. He stresses that UNDT is obligated to respect the mandatory nature of the management evaluation process and that it exceeded its competence by ordering the parties to make submissions on the merits, implying that the application on the merits would have been receivable on 31 August 2011, even though the mandatory time period for the management evaluation had not yet elapsed.

Ms. Hersh

8. In her reply, Ms. Hersh requested the Appeals Tribunal to dismiss the appeal for want of receivability and because it was irrelevant to the substantive proceedings. She maintains that by claiming excess of competence, the Secretary-General is seeking to circumvent the prohibition on appeals contained in article 2(2) and article 10(2) of the Statute of the Dispute Tribunal and to prevent the goal of timely judgments from being achieved. She further submits that the Dispute Tribunal did nothing more than exercise its case management powers in ordering the parties to make additional submissions on the merits and that the imposition of deadlines did not serve to convert her application for a suspension of action into an application on the merits. Ms. Hersh further explains that the expedited timetable did not impact adversely on the Secretary-General and did not raise any questions of jurisdiction.

Considerations

9. This Court has consistently ruled that, in general, only appeals against judgments on the merits are receivable. Appeals against decisions taken during proceedings, regardless of what the UNDT may call them - order, judgment or something else - are receivable only in exceptional cases where the UNDT has manifestly exceeded its competence.¹

10. It is evident from the jurisprudence of the Appeals Tribunal, however, that the UNDT has manifestly exceeded its competence when it takes decisions outside the jurisdiction conferred upon it by its Statute, and the inherent competence of any Tribunal charged with rendering justice in an administrative justice system governed by law and respect for the rights of the parties to the case.

11. It follows that, in precedents where the UNDT ordered the suspension of action of an administrative decision before completion of a management evaluation, in violation of the restrictions on its competence set out in article 2(2) of its Statute, the Appeals Tribunal has ruled that an appeal against such a decision is receivable and valid.²

12. Conversely, the Appeals Tribunal has ruled that the UNDT has broad discretion in all matters relating to case handling and that, in order to ensure that the case is fairly and expeditiously adjudicated and that justice is served, the Appeals Tribunal should not intervene hastily in the exercise of the jurisdictional power conferred on the Tribunal of first instance.³ It is for this reason that, in accordance with the provisions of article 2, paragraph 2, and of article 10, paragraph 2, of the UNDT Statute, appeals against decisions taken in the course of proceedings, whether with respect to procedural matters, the establishment of proof, the production of documents or the imposition of interim measures are not receivable even if the judge of first instance has erred on a question of law or fact in applying conditions to which the granting of a suspension of action is subordinated or there has been a procedural error.

13. In this case, in automatically converting an application for a suspension of action into an application on the merits, the UNDT took an *ultra petita* decision by ordering measures for which no claim had been made.

¹ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, plenary Tribunal, dissenting opinion of Judge Boyko.

² *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005; *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008; *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011; *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-159.

³ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, plenary Tribunal, dissenting opinion of Judge Boyko.

14. Furthermore, in taking the contested decision prior to the completion of a management evaluation, the UNDT contravened the provisions of article 8 of its Statute, by which a prior management evaluation is obligatory if required, thereby restricting the UNDT competence not only in cases where a staff member fails to seek a management evaluation before submitting an application contesting an administrative decision⁴ but also in cases where the Dispute Tribunal orders measures for a hearing on the merits before the lawful period for a management evaluation has elapsed.

15. When it ordered Ms. Hersh's application for a suspension of action to be transferred to the "general cause list" for a hearing on the merits and invited the parties to make submissions on the merits, the UNDT manifestly exceeded the jurisdictional power conferred on it by its Statute and the inherent competence of any Tribunal charged with rendering justice in an administrative justice system governed by law and respect for the rights of the parties to the case.

16. In view of the foregoing considerations, the appeal filed against the contested decision which the UNDT chose to call a "Judgment" but should have been called an "Order", is receivable and valid.

Judgment

17. Judgment No. UNDT/2011/154 is set aside.

Original and Authoritative Version: French

Done this 20th day of June 2012 in Geneva, Switzerland.

(Signed)

Judge Courtial, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Garewal

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

(Signed)

Weicheng Lin, Registrar

⁴ *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035.