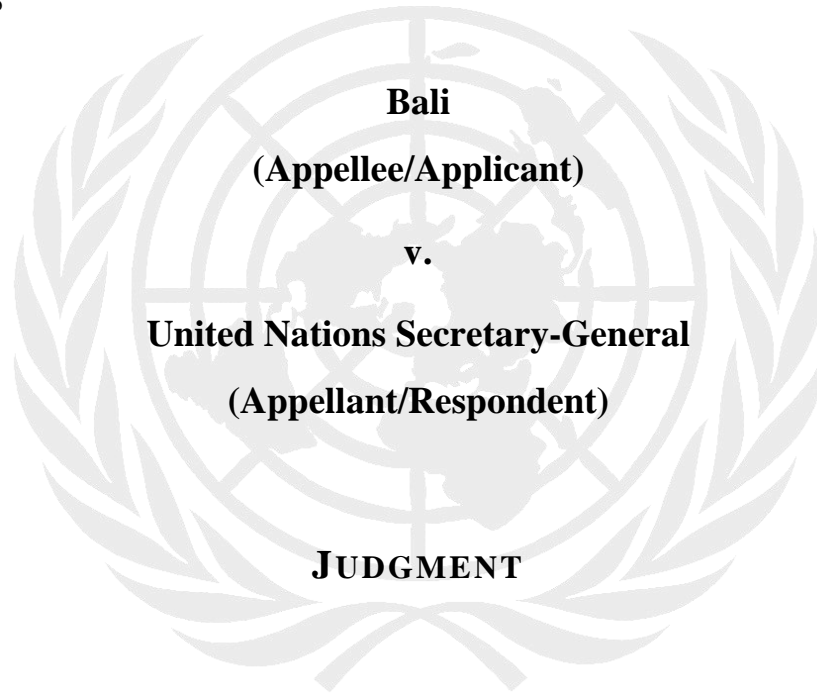




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-263



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

Judgment No.: 2012-TANU-244

Date: 29 June 2012

Registrar: Weicheng Lin

Counsel for the Appellee/Applicant: Seth Levine/Bart Willemsen

Counsel for the Appellant/Respondent: Rupa Mitra

JUDGE JEAN COURTIAL, Presiding

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed on 17 October 2011 by the United Nations Secretary-General against Judgment No. UNDT/2011/155 of the United Nations Dispute Tribunal (Dispute Tribunal or UNDT), rendered in Nairobi. On 8 December 2011 Mr. Neeraj Bali filed a brief in defence.

Summary

2. This tribunal has consistently held that as a general rule only appeals against judgments concerning matters of substance are receivable. Appeals against decisions taken during proceedings, however denominated by the UNDT (order, judgment, etc.), are non-receivable save in the exceptional cases where the UNDT has clearly exceeded its competence. However, it has become established in the jurisprudence of the Appeals Tribunal that the UNDT clearly exceeds its competence when 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 for the rights of those within its jurisdiction.

3. In ordering the placing of Mr. Bali's application for suspension on the list of cases to be considered on the merits and requesting the parties to file written documents on the merits, the UNDT clearly exceeded the jurisdictional powers conferred on it by its Statute. The judgment is rescinded.

Facts and procedure

4. Mr. Bali took up his duties with the United Nations Mission in Liberia in April 2007 as a Public Information Officer at the P.3 level. In February 2010 he was promoted to P.4 level as Radio Producer in the United Nations Mission in Sudan (UNMIS). At the time of expiry of the UNMIS mandate and the creation of the United Nations Mission in South Sudan (UNMISS) a decision was taken to transfer certain officials from UNMIS to UNMISS or to the United Nations Interim Security Force for Abyei (UNISFA). Mr. Bali was not among those transferred. On 27 July 2011 he received a letter of separation. On 12 August 2011 he filed a request for management evaluation, and on 24 August 2011 he filed an application for suspension of action on the decision with the Dispute Tribunal.

5. In Judgment No. 2011-UNDT-155, dated 31 August 2011, the Dispute Tribunal held that Mr. Bali's application for suspension of action should be dismissed on the grounds that it did not fulfil one of the three conditions necessary for the grant of a suspension. However, it stated that non-fulfilment of one

of the conditions did not extinguish an applicant's cause for action where an unlawful decision had been taken to his or her detriment, as was the case here. Having held that the contested decision not to transfer Mr. Bali from UNMIS to UNIMSS was unlawful, the Dispute Tribunal ordered the application for suspension to be placed on the "general cause" list of cases to be considered on the merits. It also requested Mr. Bali to file an exhaustive application on the merits within 28 days and requested the respondent to file a comprehensive reply within the 14 days following receipt of Mr. Bali's application.

Arguments of the parties

The Secretary-General

6. The Secretary-General has appealed. He asserts that the Dispute Tribunal has exceeded its competence in ordering a hearing to be held on the merits at a time when Mr. Bali has not introduced an appeal on the merits; at that time he had merely requested suspension of action on the contested decision pending completion of the management evaluation. Nothing in the Tribunal's Statute authorizes the Tribunal to convert an application for suspension into an application on the merits, and it cannot invoke its Rules of Procedure to acquire competences not conferred on it by its Statute. Once the application for suspension was dismissed, the Tribunal was no longer seized of the case until Mr. Bali filed an application on the merits. The Tribunal has to respect the mandatory nature of a management evaluation, and in requesting the parties to file conclusions on the merits (implying that the application on the merits would have been receivable on 31 August 2011, when the irreducible deadline for completion of the management evaluation had not yet expired) the Tribunal has exceeded its competence.

Mr. Bali

7. In his brief in reply Mr. Bali requests the Appeals Tribunal to dismiss the appeal as non-receivable and without relevance to the proceedings on the merits. In alleging an abuse of competence the Secretary-General is seeking to circumvent the limitations imposed by the provisions of articles 2(2) and 10(2) of the Dispute Tribunal's Statute and prevent attainment of the goal of expeditious justice. Furthermore, in requesting the parties to file conclusions on the merits the Dispute Tribunal only exercised its power to manage cases, and the fixing of deadlines for that purpose has not given rise to conversion of his application for suspension of action into an application on the merits. Finally, the accelerated time-frame does not prejudice the rights of the Secretary-General or give rise to any problem of competence.

Considerations

8. This tribunal has consistently held that as a general rule only appeals against judgments concerning matters of substance are receivable. Appeals against decisions taken during proceedings, however denominated by the UNDT (order, judgment, etc.), are non-receivable save in the exceptional cases where the UNDT has clearly exceeded its competence.¹

9. It has become established in the jurisprudence of the Appeals Tribunal that the UNDT clearly exceeds its competence when 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.

10. Consequently, in earlier 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 on its competence defined in article 2(2) of its Statute, the Appeals Tribunal has considered an appeal against such a finding receivable and founded.²

11. On the other hand, the Appeals Tribunal has considered that the UNDT enjoys wide powers of appreciation in all matters relating to case handling and that it must not interfere lightly in the exercise of the jurisdictional powers conferred on the tribunal of first instance to ensure that case are tried fairly and expeditiously and for dispensation of justice.³ For this reason, in pursuance of the provisions of article 2(2) and 10(2) of the UNDT Statute, appeals against decisions taken in the course of proceedings - both decisions relating to procedure, the establishment of proof or the production of documents, or ordering interim measures - are non-receivable, even where the judge in 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.

12. In this specific case, in converting on its own motion an application for suspension into an application on the merits the UNDT took an *ultra petita* decision, ordering measures not requested of it.

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

² *Tadonki 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, *Igbinedion 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.

13. Moreover, in taking the contested decision while a management evaluation was under way, the UNDT breached the provisions of Article 8 of its Statute, which makes prior management evaluation compulsory whenever one is requested and thereby restricts the competence of the UNDT, not only where the official fails to request a management evaluation before filing an application contesting an administrative decision,⁴ but also where the tribunal orders measures for the handling of a case on the merits before the expiry of the legally permitted period for the evaluation.

14. In ordering the placing of Mr. Bali's application for suspension on the list of cases to be considered on the merits and requesting the parties to file written documents on the merits, the UNDT has clearly exceeded the jurisdictional powers 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.

15. From the foregoing considerations it follows that the appeal against the contested decision, which the UNDT has chosen to call a "judgment" (although it would be more appropriate to call it an "order"), is receivable and founded.

Judgment

16. Judgment UNDT/2011/155 is rescinded.

Original and Authoritative Version: French

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

(Signed)

Judge Courtial, Presiding

(Signed)

Judge Adenyira

(Signed)

Judge Garewal

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

(Signed)

Weicheng Lin, Registrar

⁴ *Critchlow v. United Nations Secretary-General*, Judgment No. 2010-UNAT-035.