



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

Case Nos. 2011-267, 2011-271 & 2011-276

**Benchebbak
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Luis María Simón Judge Rosalyn Chapman
Judgment No.:	2012-UNAT-256
Date:	1 November 2012
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant: Phyllis Hwang/Amy Wood

Counsel for Appellant/Respondent: Miles Hastie

JUDGE INÉS WEINBERG DE ROCA, Presiding

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it three appeals filed by the Secretary-General of the United Nations against Order No. 129 (2011/NBI), Order No. 136 (NBI/2011), and Order No. 142 (NBI/2011), issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 19 October 2011, 31 October 2011 and 10 November 2011, respectively.

Synopsis

2. All three appeals are receivable, because the UNDT exceeded its jurisdiction or competence in ordering the suspension of the contested decision beyond the date of the completion of management evaluation in a matter concerning an appointment.

3. 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. 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.¹

4. The UNDT, on the other hand, should follow the clear and consistent jurisprudence of the Appeals Tribunal.

Facts and Procedure

5. On 3 February 2010, Mr. Abdelouahead Benchebbak joined the United Nations Mission for the Referendum in Western Sahara (MINURSO) as a Fuel Assistant on a one-year fixed-term appointment.

6. In the course of verifying Mr. Benchebbak’s academic credentials, the Organization found that Mr. Benchebbak lacked a high school diploma, which was required for the position.

¹ *Villamorán v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160.

7. On 23 May 2011, Mr. Benchebbak was informed that the Office of Human Resources Management (OHRM) had completed a review of his qualifications and concluded that he lacked the required academic credentials. Mr. Benchebbak's appointment was therefore extended to 22 June 2011 to cover 30 calendar days' written notice to end his fixed-term appointment. His appointment was subsequently extended on a monthly basis until 22 October 2011, pending review of additional documentation submitted by Mr. Benchebbak.

8. On 23 September 2011, Mr. Benchebbak was informed that his appointment would not be extended beyond 22 October 2011. On 6 October 2011, Mr. Benchebbak requested management evaluation of that decision.

9. On 17 October 2011, Mr. Benchebbak asked the UNDT to suspend the implementation of the contested decision, pending management evaluation. On 19 October 2011, the UNDT issued Order No. 129 by which it ordered the suspension of the contested decision until 10 November 2011, to "allow the filing of the Respondent's comments, the hearing and the determination of this matter". The UNDT ordered an oral hearing on 3 November 2011.

10. On 27 October 2011, Mr. Benchebbak filed his response to Order No. 129, to inform the UNDT that the management evaluation had been completed on 26 October 2011 and that the decision had been upheld. The Secretary-General also noted that the extension of Mr. Benchebbak's fixed-term appointment until 10 November 2011 was to allow the filing of the Respondent's comments, the hearing and the determination of the matter. The Secretary-General requested that the Order be discharged.

11. On 31 October 2011, Mr. Benchebbak filed an application on the merits with the Dispute Tribunal as well as a request for interim relief. That same day, the UNDT issued Order No. 136, by which it rejected the Secretary-General's request to have Order No. 129 discharged.

12. On 3 November 2011, the Dispute Tribunal held an oral hearing. On 10 November 2011, the Dispute Tribunal issued Judgment No. UNDT/NBI/191 on suspension of action. The UNDT noted that Mr. Benchebbak was "not pressing the art. 13 Application anymore" and held that Order No. 129 was "no longer in force as of the date of this Judgment". That same day, the UNDT also issued Order No. 142 by which it disposed of Mr. Benchebbak's application for suspension of action under Article 14 of the UNDT Rules of Procedure. The

UNDT found the application receivable as the contested decision amounted to a non-renewal rather than a termination. The UNDT accordingly found that the prohibition of the suspension of decisions on appointment, promotion, and termination provided for in Article 10(2) of the UNDT Statute and Article 14 of the UNDT Rules of Procedure did not apply. The UNDT found that the criteria for suspending the contested decision were met and consequently ordered the continued suspension of the contested decision, pending the determination of the case on the merits.

13. The Secretary-General appeals Order No. 129, Order No. 136 and Order No. 142.

Submissions

Secretary-General's Appeals

Order No. 129 (2011/NBI) and Order No. 136 (NBI/2011)

14. The Secretary-General submits that the appeals are receivable.

15. The Secretary-General submits that the UNDT exceeded its jurisdiction or competence by ordering (and confirming in Order No. 136) the suspension of the contested decision beyond the period of management evaluation. The management evaluation was completed on 26 October 2011 and the UNDT exceeded its jurisdiction in ordering (and confirming in Order No. 136) the suspension beyond that date.

16. The Secretary-General requests that the Appeals Tribunal find that there is no obligation to execute an order suspending a contested decision beyond the period of management evaluation, pending an appeal, as the Appeals Tribunal has already confirmed such an order to be unlawful. The Secretary-General submits that in *Villamorán*,² the Appeals Tribunal was concerned that a decision by the Organization to suspend the implementation of an order under appeal may appear to pre-empt or pre-judge the examination by the Appeals Tribunal of the appeal. This concern resulted from the fact that the suspension of action request was based on a new ground that had not been previously considered by the Appeals Tribunal. The Appeals Tribunal has repeatedly and unambiguously held that the Dispute Tribunal cannot issue an order suspending an

² *Ibid.*

administrative decision beyond the pendency of a management evaluation, and declining to implement such an order does not give rise to this concern.

17. The Secretary-General requests that the Appeals Tribunal annul Order No. 129 and Order No. 136 insofar as they relate to the suspension of the contested decision from 27 October to 10 November 2011. He requests the Appeals Tribunal to find that the Organization is entitled to recover from Mr. Benchebbak any salaries and emoluments paid during the aforementioned period.

Order No. 142 (NBI/2011)

18. The Secretary-General submits that the appeal is receivable. By ordering the suspension of the contested decision until the determination of the case on the merits, the UNDT erred in law and exceeded its competence.

19. The Secretary-General submits that Article 10(2) of the UNDT Statute provides that the UNDT may suspend the implementation of a contested decision “except in cases of appointment, promotion or termination”. The UNDT erred in finding that because the contested decision involved a “non-renewal” and not a “termination”, the prohibition in Article 10(2) did not apply. The Secretary-General submits that the Dispute Tribunal has erred on a question of law and exceeded its competence in declining to consider a decision of non-renewal as a decision of appointment, which cannot be suspended pursuant to the prohibition set forth in Article 10(2) of the UNDT Statute.

20. The Secretary-General requests that the Appeals Tribunal annul Order No. 142 in its entirety and order Mr. Benchebbak to reimburse the Organization all monies received as a consequence of Order No. 142.

Mr. Benchebbak’s Answers

Order No. 129 (2011/NBI) and Order No. 136 (NBI/2011)

21. Mr. Benchebbak contends that the appeals are moot.

22. Mr. Benchebbak argues that the appeals are not receivable. The interim suspension was lawfully ordered in accordance with the Appeals Tribunal's holding in *Villamorán*.³ The preliminary suspension was not scheduled to extend beyond management evaluation, but to the determination of the Rule 13 motion. It is impossible for the UNDT to foresee when management evaluation would be complete and "[t]he lapse of the operation of the suspension of action, upon management evaluation, was to be understood from the context". With respect to Order No. 136, Mr. Benchebbak submits that the UNDT declined "to wholly dissolve Order No. 129 and *confirmed* the effect of the Administration's decision upon the [Management Evaluation Unit's] recommendation". (Italics in original) Further, Order No. 136 is not a fresh ruling independent from Order No. 129 and the appeal against it is, therefore, not receivable. The Order is lawful and the UNDT did not exceed its competence.

23. Mr. Benchebbak submits that the Administration is obliged to comply with all UNDT's Orders. A party cannot ignore injunctive relief that it believes to be unlawful.

24. Mr. Benchebbak submits that, regardless of the outcome of the appeal, the Organisation cannot claim that he pay back his salary and entitlements. Such relief is not provided for in Article 9 of the Statute of the Appeals Tribunal.

Order No. 142 (NBI/2011)

25. Mr. Benchebbak submits that the appeal is not receivable, since the UNDT has not exceeded its competence. He argues that the notion "non-renewal" cannot be subsumed under either "termination" or "appointment", and does not, therefore, fall under the prohibition set forth in Article 10(2) of the UNDT Statute.

26. Mr. Benchebbak submits that the Appeals Tribunal has no jurisdiction to adjudicate requests for the return of monies already paid.

27. Should the Appeals Tribunal grant the appeals, Mr. Benchebbak requests that the case be remanded to the UNDT to determine an appropriate alternative form of relief. Ordering the suspension of the implementation of the contested decision, the UNDT accepted the threat of irreparable harm. The UNDT would therefore have to revisit the issue of interim relief.

³ *Ibid.*

Considerations

28. Article 2 of the UNDT Statute, laying out the general structure and jurisdiction of the UNDT, grants the power to suspend the implementation of an administrative decision during the pendency of management evaluation.

29. Article 10(2) of the Statute of the UNDT provides that the UNDT may adopt interim measures at any time of the proceedings, that is to say, once judicial proceedings have been initiated. Among those measures, it provides for the suspension of the implementation of administrative decisions but prohibits the adoption of such suspension *in cases of appointment, promotion, or termination*. These cases are also subject to special treatment under Article 10(5)(a) of the UNDT Statute, which provides for compensation as an alternative to the rescission of the administrative decision.

30. Articles 13 and 14 of the UNDT Rules of Procedure follow the same logic, albeit with slightly different wording. They should not be read as amending the Statute, because they are mere instruments to implement the Statute (see Article 7(1) of the UNDT Statute).

31. Articles 2(2) and 10(2) of the UNDT Statute govern the suspension of the implementation of an administrative decision and must be read together. The first concerns the time period pending management evaluation, and the second, the time period of judicial proceedings before the UNDT. It must also be pointed out that, in principle, administrative decisions are executable upon their adoption. Therefore, the suspension of the execution or implementation of an administrative decision constitutes an exception that cannot be extended beyond the limits and prohibitions established by the Statute so that the legislative texts, spirit, and goals underlying them are not ignored or violated.

32. The Appeals Tribunal is of the view that the exclusion of the right to appeal a decision to suspend the execution of an administrative decision constitutes an exception to the general principle of the right to appeal and must, therefore, be narrowly interpreted. As a result, this exception applies only to jurisdictional decisions ordering the suspension of an administrative decision pending management evaluation. The Appeals Tribunal thus considers that no jurisdictional decision, no matter how it is named by the Dispute Tribunal, which, as in the present case, orders the suspension of a contested administrative decision for a period beyond the date on which the management evaluation is completed, can be

considered as falling within the scope of the exception to the right to appeal as outlined in the aforementioned provisions of Article 2(2) of the UNDT Statute, and of Article 13 of its Rules of Procedure.⁴ In the instant case, Order No. 129 suspended the contested decision beyond management evaluation. Order No. 136 confirmed Order No. 129 despite the fact that management evaluation had been finalized. Finally, Order No. 142 decided a suspension in a matter of appointment but failed to follow the clear and reiterated jurisprudence of the Appeals Tribunal.

33. The Statute clearly prohibits the adoption of such suspension in cases of appointment, promotion, or termination. The appeals are receivable because the UNDT exceeded its jurisdiction in ordering the suspension of the contested decision beyond the date of completion of management evaluation in a matter concerning an appointment.

34. The three Orders violated Article 2(2) of the UNDT Statute, which provides for suspension of the implementation of a contested decision only “during the pendency of the management evaluation”, and Article 10(2) of the UNDT Statute, which prohibits the suspension of the implementation of an administrative decision, during the proceedings before the UNDT, in cases of appointment, promotion, or termination.

35. For the foregoing reasons, we grant the three appeals.

36. As we are not seized of an appeal on the merits of the case, we do not need to decide, at this time, whether or not the Appeals Tribunal has jurisdiction to order a staff member to pay back salaries and emoluments.

37. 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. 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, however, apply to interlocutory appeals. It falls to the Appeals Tribunal to decide whether the UNDT exceeded its jurisdiction and the Administration cannot refrain from

⁴ *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-159; *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008.

executing an order by filing an appeal against it on the basis that the UNDT exceeded its jurisdiction.⁵

38. The UNDT, on the other hand, is expected to follow the clear and consistent jurisprudence of the Appeals Tribunal in *Tadonki*,⁶ *Onana*,⁷ and *Kasmani*.⁸

Judgment

39. The Appeals Tribunal grants the appeals and vacates Order No. 129, Order No. 136, and Order No. 142.

Original and Authoritative Version: English

Dated this 1st day of November 2012 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Simón

(Signed)

Judge Chapman

Entered in the Register on this 18th of January 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar

⁵ *Villamorán*, 2011-UNAT-160.

⁶ *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.

⁷ *Onana*, 2010-UNAT-008.

⁸ *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011.