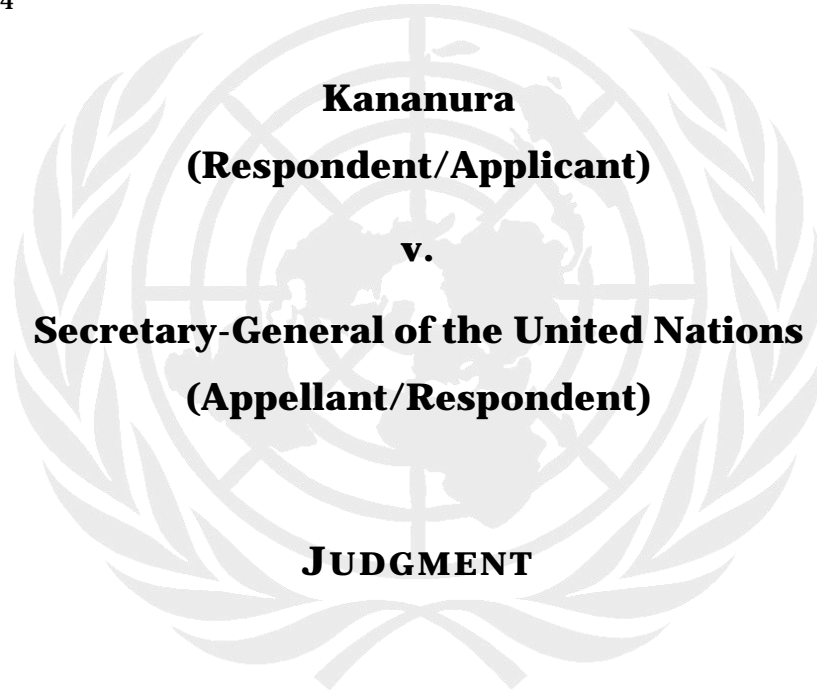




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Case No. 2011-274



**Kananura  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Mary Faherty, Presiding Judge Sophia Adinyira Judge Richard Lussick
Judgment No.:	2012-UNAT-258
Date:	1 November 2012
Registrar:	Weicheng Lin

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Counsel for Respondent/Applicant: Duke Danquah

Counsel for Appellant/Respondent: Rupa Mitra

**JUDGE MARY FAHERTY**, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General on 22 November 2011 against Judgment No. UNDT/2011/176, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 13 October 2011. Ms. Esther Kananura filed her answer on 9 January 2012.

### **Synopsis**

2. The Appeals Tribunal has consistently held that appeals against decisions taken during UNDT proceedings are non-receivable save in circumstances where the UNDT has exceeded its jurisdiction or competence. Notwithstanding the prohibition set out in Article 2(2) of the UNDT Statute, we have held that appeals concerning suspension of action decisions are also receivable, if the decision of the UNDT was made in excess of its jurisdiction or competence.

3. We have held in *Khambatta*<sup>1</sup> that in exercising judicial review of such decisions, the Appeals Tribunal will not lightly interfere with the Dispute Tribunal's exercise of its jurisdictional powers, conferred on it by its Statute, to enable cases to be judged fairly and expeditiously.

4. It is against the backdrop of the established jurisprudence that the present appeal must be considered.

5. The complaints made by the Secretary-General, in the view of this Tribunal, fall squarely within the jurisdiction and competence of the UNDT, notwithstanding the alleged breach of procedural fairness. In those circumstances, the present appeal is not receivable.

### **Facts and Procedure**

6. Ms. Kananura held a temporary appointment at the P-3 level in the Office of Human Resources Management from 6 October 2009 to 30 June 2010. From 15 July 2010 to 14 June 2011, Ms. Kananura served on a temporary appointment at the P-4 level in the Department of Field Support (DFS). Her appointment was subsequently extended until

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<sup>1</sup> *Khambatta. v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-252.

30 September 2011. The programme manager then asked the DFS Executive Office to further extend Ms. Kananura's appointment until 31 December 2011. On 22 September 2011, Ms. Kananura was informed that she would reach her limit of 729 days under ST/AI/2010/4 (Administration of temporary appointments) which specifies the maximum duration of a temporary appointment. She would, therefore, have to take a break in service from 18 October 2011.

7. On 7 October 2011, Ms. Kananura filed a request for management evaluation of the decision. On 10 October 2011, she filed a request for suspension of action, which was submitted to the Secretary-General on 11 October 2011. That same day, the UNDT Registry informed the Secretary-General that the UNDT did not require a response from the Secretary-General and that a judgment was in the process of being drafted. On 13 October 2011, the UNDT issued its Judgment. It found that the three conditions for granting suspension of action, as stipulated in Article 2(2) of the UNDT Statute, were met and granted a suspension of the implementation of the contested decision, pending management evaluation.

### **Submissions**

#### **Secretary-General's Appeal**

8. The Secretary-General submits that, although the appeal is directed against a suspension of action judgment, it is receivable as the UNDT exceeded its jurisdiction or competence. He argues that since he does not challenge the substantive findings regarding the merits of the application for suspension of action, it is not precluded by Article 2(2) of the UNDT Statute.

9. The Secretary-General submits that by ruling on the application for suspension of action without allowing him an opportunity to respond, the UNDT violated the principle of *audi alteram partem*. Article 13(2) of the UNDT Rules of Procedure gives effect to this principle, providing that the Registrar "shall transmit the application to the respondent". Furthermore, Article 13(3) of the UNDT Rules of Procedure provides that the time limit for the UNDT to dispose of an application for suspension of action runs from the time of service of the application upon the respondent, not from the time the application is filed with the Registry. Article 13(3) of the UNDT Rules of Procedure is, therefore, consistent with the principle of *audi alteram partem* as it allows the respondent a minimum amount of time to respond.

10. The Secretary-General submits that, had he been allowed to respond, he would have argued that any urgency in the case was created by Ms. Kananura's delay in filing her application for suspension of action.

11. The Secretary-General submits that by ruling on the application for suspension of action without giving him the opportunity to respond, the UNDT violated the principle of equality before courts and tribunals and thereby exceeded its competence, erred in law and fact and committed a procedural error such as to affect the decision of the case. There were no legal distinctions in this case which would have justified a departure from the principle.

12. The Secretary-General requests the Appeals Tribunal to vacate the UNDT Judgment.

**Ms. Kananura's Answer**

13. Ms. Kananura submits that the appeal is not receivable.

14. She avers that the UNDT did not violate the principle of *audi alteram partem*. Ms. Kananura contends that the UNDT only engaged in an interlocutory exercise that did not involve the actual merits of the case and, consequently, the permanent interests of the Secretary-General could not have been injured.

15. Ms. Kananura submits that the UNDT did not commit any procedural errors. Under Article 2(2) of the UNDT Statute and Article 13(2) of the UNDT Rules of Procedure, the UNDT was not required to seek a response from the Secretary-General. Rather, it was within the UNDT's discretion to decide whether the responding party should be given the opportunity to respond. Therefore, the UNDT did not abuse its discretionary authority when rendering a judgment on suspension of action without hearing the Respondent.

**Considerations**

16. The issue for this Tribunal to determine is whether the UNDT exceeded its jurisdiction or competence in ordering suspension of action on the basis of an application made by Ms. Kananura in respect of which the Secretary-General, albeit on notice of the application, was not afforded an opportunity to argue against the making of the order.

17. The Secretary-General, inter alia, argues that the denial of his opportunity to respond violates the principle of *audi alterem partem*.

18. The Secretary-General asserts that the failure to give him a voice is not consistent with Article 13(2) of the UNDT Rules of Procedure, which provides for notice to be given, and Article 13(3), which provides for the five-day period, in which the decision must be made, to commence from the time of the service of the application on him.

19. Article 2(2) of the UNDT Statute provides that a decision of the UNDT on an application to suspend the implementation of an administrative action is not subject to appeal.

20. The extent of the statutory prohibition on a right of appeal, following a suspension of action decision, has been the subject of analysis by this Tribunal in a number of cases. It is well-established case law, having regard to the provisions of Article 2(1) of the Statute of the Appeals Tribunal, that, generally, only appeals against judgments of the UNDT concerning matters of substance are receivable.

21. The Appeals Tribunal has consistently held that appeals against decisions taken during UNDT proceedings are non-receivable save in circumstances where the UNDT has exceeded its jurisdiction or competence. Notwithstanding the prohibition set out in Article 2(2) of the UNDT Statute, we have held that appeals concerning suspension of action decisions are also receivable, if the decision of the UNDT was made in excess of its jurisdiction or competence.

22. In *Khambatta*,<sup>2</sup> this Tribunal stated as follows:

It has become established in the jurisprudence of the UNAT 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.

23. The Appeals Tribunal will not lightly interfere with the Dispute Tribunal's exercise of its jurisdictional powers, conferred on it by its Statute to enable cases to be judged fairly and expeditiously.

24. It is against the backdrop of this Tribunal's established jurisprudence that the present appeal must be considered.

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<sup>2</sup> *Ibid*, para. 13.

25. The complaints made by the Secretary-General, in the view of this Tribunal, fall squarely within the jurisdiction and competence of the UNDT, notwithstanding the alleged breach of procedural fairness. In those circumstances, the present appeal is not receivable.

**Judgment**

26. For the foregoing reasons, the appeal is dismissed.

Original and Authoritative Version: English

Dated this 1<sup>st</sup> day of November 2012 in New York, United States.

*(Signed)*

Judge Faherty, Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Lussick

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

*(Signed)*

Weicheng Lin, Registrar