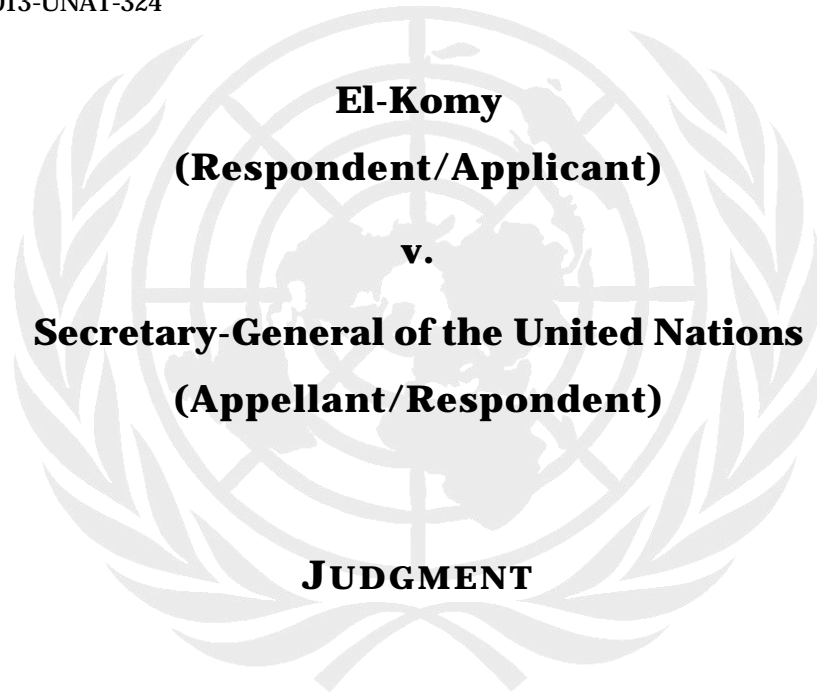




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2013-UNAT-324



**El-Komy  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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**Before:** Judge Inés Weinberg de Roca, Presiding  
Judge Luis María Simón  
Judge Richard Lussick

**Case No.:** 2013-487

**Date:** 31 July 2013

**Registrar:** Weicheng Lin

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**Counsel for Respondent/Applicant:** Lennox S. Hinds  
Claire Gilchrist

**Counsel for Appellant/Respondent:** Wambui Mwangi

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Order No. 118 (NY/2013), rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 29 April 2013 in the case of *El-Komy v. Secretary-General of the United Nations*. The Secretary-General appealed on 4 June 2013, and Mr. Ahmad Adbul-Basset El-Komy answered on 1 July 2013.

### **Facts and Procedure**

2. Mr. El-Komy entered the service of the United Nations as an Arabic Translator in the Arabic Translation Service, Department of General Assembly and Conference Management, on 25 June 2009 on a two-year probationary appointment. His probationary period was subsequently extended.

3. On 28 February 2013, Mr. El-Komy was informed that he would not be granted a permanent appointment and, accordingly, that he would be separated from service on the expiration of his probationary appointment on 31 March 2013. He requested management evaluation of this decision on 28 February and, again, on 18 March 2013, requesting suspension of the contested decision and seeking a retroactive permanent appointment.

4. On 20 March 2013, Mr. El-Komy filed an application with the UNDT in New York for suspension of action pending the completion of management evaluation and, on 26 March 2013, the UNDT issued Order No. 76 (NY/2013), ordering such suspension. As a result, his probationary appointment was extended until 30 April 2013.

5. On 24 April 2013, Mr. El-Komy appealed the merits of his case to the UNDT. Later that day, the Management Evaluation Unit responded to his 18 March request, upholding the contested decision. On 25 April 2013, Mr. El-Komy filed a motion with the Dispute Tribunal, requesting an expedited hearing.

6. On 29 April 2013, the Dispute Tribunal issued Order No. 118 (NY/2013), denying Mr. El-Komy's request for an expedited hearing prior to 30 April but suspending "the implementation of the decision to separate [him] ... pending the final determination of the substantive merits of the application or until such further Order as may be deemed appropriate

by the Tribunal”. The Dispute Tribunal considered that the exclusionary provision of Article 10(2) of the UNDT Statute was not applicable and, accordingly, the Dispute Tribunal had the power to order such interim relief. The UNDT indicated that it would consider whether to review the case on an expedited basis once it had received the Secretary-General’s reply but “entreated [the parties] to explore informal resolution ... in the interim”.

### **Submissions**

#### **The Secretary-General’s Appeal**

7. The Secretary-General contends that the Dispute Tribunal erred on a question of law and exceeded its competence when it ordered suspension of the contested decision until the case could be determined on its merits. In so acting, the Dispute Tribunal violated Article 10(2) of its Statute.

8. The Secretary-General further contends that as the impugned decision concerned the non-granting of a permanent appointment, it was a matter of appointment which fell within the limitations of Article 10(2) of the UNDT Statute.

9. The Secretary-General requests that Order No. 118 (NY/2013) be annulled in its entirety.

10. He further requests that, in view of the circumstances of the case, the Appeals Tribunal review the matter on an expedited basis.

#### **Mr. El-Komy’s Answer**

11. Mr. El-Komy submits that the appeal is not receivable, as the Dispute Tribunal did not exceed its jurisdiction.

12. He further submits that the Dispute Tribunal properly identified the case before it as concerning separation from service, not appointment, and was thus entitled to order suspension of action.

13. Mr. El-Komy contends that he will suffer irreparable harm if the Order is annulled and he is separated from service prior to his case being reviewed on its merits.

14. Finally, Mr. El-Komy asks the Appeals Tribunal to reject the Secretary-General's plea for expedited review.

### **Considerations**

15. 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.

16. 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.

17. 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).

18. 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.<sup>1</sup>

19. 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

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<sup>1</sup> *Benchebbak v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-256.

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.

20. The UNDT Statute clearly prohibits the adoption of such suspension in cases of appointment, promotion, or termination. The appeal is 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.<sup>2</sup>

21. The UNDT in Order No. 118 (NY/2013) 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.

22. It follows from the foregoing considerations that the Dispute Tribunal clearly exceeded its competence and, therefore, the appeal against the impugned Order is receivable and well founded.

### **Judgment**

23. The appeal is allowed and UNDT Order No. 118 (NY/2013) of 29 April 2013 is rescinded.

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<sup>2</sup> *Bali v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-244;  
*Nwuke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-230.

Original and Authoritative Version: English

Dated this 31<sup>st</sup> day of July 2013.

*(Signed)*

Judge Weinberg de Roca,  
Presiding  
Buenos Aires, Argentina

*(Signed)*

Judge Simón  
Montevideo, Uruguay

*(Signed)*

Judge Lussick  
London, UK

Entered in the Register on this 31<sup>st</sup> day of July 2013 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar