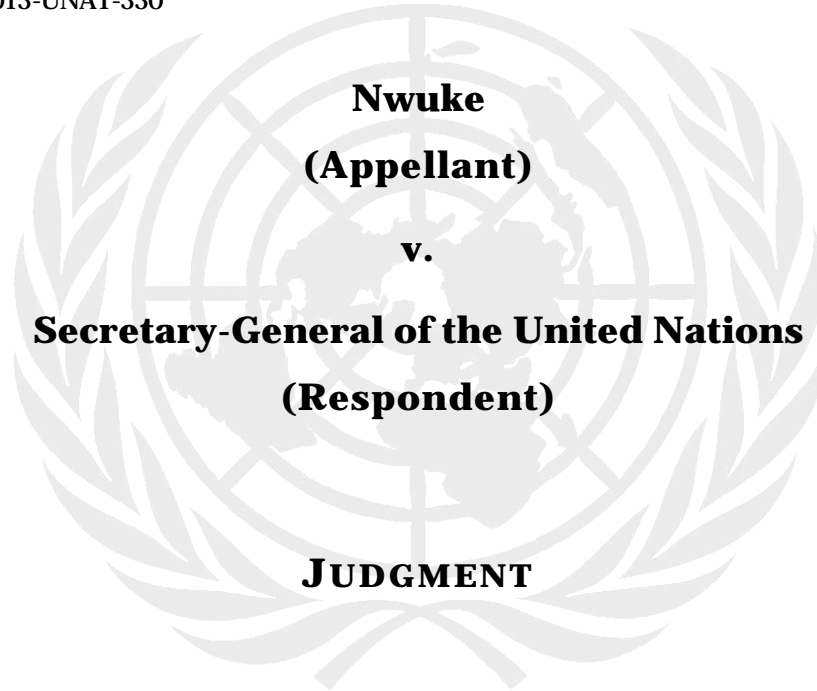




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-330



Before: Judge Mary Faherty, Presiding
Judge Luis María Simón
Judge Rosalyn Chapman

Case Nos.: 2012-359 & 2012-362

Date: 28 June 2013

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Paul Oertly

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals by Mr. Kasirim Nwuke, one against Order No. 103 (NBI/2012) and the other against Judgment No. UNDT/2012/116, both of which were issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 1 August 2012. Mr. Nwuke appealed on 3 August 2012 and 14 August 2012, respectively. The Secretary-General filed one answer to both appeals on 13 September 2012.

Facts and Procedure

2. Mr. Nwuke has been a staff member with the Economic Commission for Africa (ECA) in Addis Ababa since 2001. In November 2011, when the present case arose, he was the P-5 Chief of Section with the Office of Strategic Planning and Programme Management.

3. On 8 November 2011, a temporary vacancy announcement for the D-1 post of Director, Governance and Public Administration Division (GPAD), was circulated, the incumbent, Mr. Hamdok, having been promoted as Deputy Executive Secretary of ECA. Mr. Nwuke applied, but he was not interviewed or selected. On 22 November 2011, Mr. Adejumbi was selected to fill that temporary position.

4. On 8 December 2011, a vacancy announcement for the post of Director/GPAD was circulated on Inspira. A week later, the vacancy announcement was amended, with paragraph 2 in respect of the lateral movement requirements removed, and reposted on Inspira. Mr. Nwuke applied. This time, he was shortlisted and was interviewed on 28 March 2012. On 26 July 2012, the ECA Executive Secretary announced the appointment of Mr. Adejumbi as the new Director/GPAD effective 1 August 2012.

5. Mr. Nwuke requested management evaluation on 26 July 2012 and suspension of the implementation of the decision to appoint Mr. Adejumbi on 30 July 2012.

6. The UNDT of Nairobi held a hearing on 1 August 2012, Judge Boolell presiding. In Order No. 103 (NBI/2012) dated 1 August 2012, Judge Boolell rejected Mr. Nwuke's suspension request because the impugned decision had been implemented. Mr. Nwuke appealed that Order. This is Case No. 2012-359.

7. In Judgment No. UNDT/2012/116 also dated 1 August 2012, Judge Boolell provided the reasons as to why he had decided not to grant Mr. Nwuke's suspension request. Judge Boolell found that Mr. Nwuke's suspension request met the test of *prima facie* unlawfulness, one of the three cumulative conditions for a successful suspension request. In his view, the impugned decision was fraught with procedural irregularities. However, Judge Boolell considered that as the impugned decision was implemented when the selected candidate was notified on 20 July 2012, Mr. Nwuke's suspension request failed to meet the "urgency" requirement set out in Article 2(2) of the UNDT Statute. Mr. Nwuke appealed that Judgment. This is Case No. 2012-362.

Submissions

Mr. Nwuke's Appeals

Case No. 2012-359

8. The UNDT failed to exercise the jurisdiction and competence vested in it by refusing to entertain Mr. Nwuke's application for suspension of action of the decision under appeal.

9. The UNDT exceeded its authority when it did not consider all relevant laws of the Organization.

10. The UNDT Judge should have recused himself from this case, as he had decided on a similar case in 2012.¹ In that earlier case, the UNDT Judge rejected the application for suspension of action for the same reason given in the Order under appeal. By presiding over the present case, the UNDT Judge exercised what amounted to an appellate review of his own previous judgment.

Case No. 2012-362

11. The UNDT failed to exercise the jurisdiction and competence vested in it by rejecting his suspension of action application when, it is submitted, the impugned decision was not implemented.

¹ *Nwuke v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/002.

12. The UNDT erred in law when it failed to consider all relevant arguments of law before concluding that the contested decision had been implemented.

13. The UNDT committed an error of procedure by assigning Judge Boolell to the present case. Such procedural error affected the determination of the case.

The Secretary-General's Answer

14. Mr. Nwuke's appeals in Cases No. 2012-359 and No. 2012-362 are not receivable. Mr. Nwuke is challenging the UNDT's determination of whether the criteria for ordering suspension of action were met. Such disagreement goes to the merits of the UNDT's decision; it does not constitute the proper basis for appeal of an order on suspension of action. To permit such appeals would contravene the express prohibition in appealing suspension of action decisions as set forth in Article 2(2) of the UNDT Statute.

15. The judgments of the Appeals Tribunal cited by Mr. Nwuke are not applicable to the present case, as in those judgments the Appeals Tribunal allowed appeals against the UNDT orders to suspend the implementation of the contested decisions when the UNDT engaged in a positive act in the purported exercise of its jurisdiction. In the present case, however, the UNDT declined to exercise its jurisdiction by refusing to grant Mr. Nwuke's application for suspension of action.

Considerations

16. Mr. Nwuke claims that the UNDT failed to exercise the jurisdiction or competence vested in it by rejecting his plea for suspension of the selection decision which was the subject of his application to the Dispute Tribunal pursuant to Article 2(2) of the UNDT Statute.

17. The Secretary-General urges the Appeals Tribunal to find the appeals not receivable on the basis that Mr. Nwuke's contentions do not highlight any instance of an excess of jurisdiction by the UNDT.

18. Article 2(2) of the UNDT Statute provides:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation,

where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

19. The jurisprudence of the Appeals Tribunal establishes that appeals from the Dispute Tribunal on suspension of action decisions will be receivable only if that Tribunal, in adjudicating on such applications, exceeded its competence or jurisdiction.²

20. In *Wamalala*, we have stated, *inter alia*,

The Appeals Tribunal has held that the UNDT enjoys wide powers of discretion in all matters relating to case management and that it must not interfere lightly in the exercise of the jurisdictional powers conferred on the tribunal of first instance to enable cases to be judged fairly and expeditiously and for the dispensation of justice. For this reason, and in accordance with Articles 2(2) and 10(2) of the UNDT Statute, appeals against decisions taken in the course of proceedings and relating to procedure, such as matters of proof, the production of evidence, or interim measures, are not receivable, even where the judge of 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.³

21. The issue for consideration is whether Mr. Nwuke's claims fall within the parameters of our established jurisprudence as referred to above such as to admit his appeals.

22. Having reviewed the arguments made by both sides, we are satisfied that Mr. Nwuke has not established any excess of jurisdiction or competence on the part of the Dispute Tribunal; rather, his claims address the merits of the UNDT decision. Even if the UNDT erred in law or fact and, as also alleged here, committed an error of procedure, this does not instance any excess of jurisdiction or competence on its part such as would entitle Mr. Nwuke to bypass the exception to the right to appeal set out in Article 2(2) of the UNDT Statute. Accordingly, the appeals are not receivable.

Judgment

23. The appeals are dismissed.

² *Mpacko v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-314; *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011; *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008; *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.

³ *Wamalala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300, para. 17.

Original and Authoritative Version: English

Dated this 28th day of June 2013 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Simón

(Signed)

Judge Chapman

Entered in the Register on this 26th day of August 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar