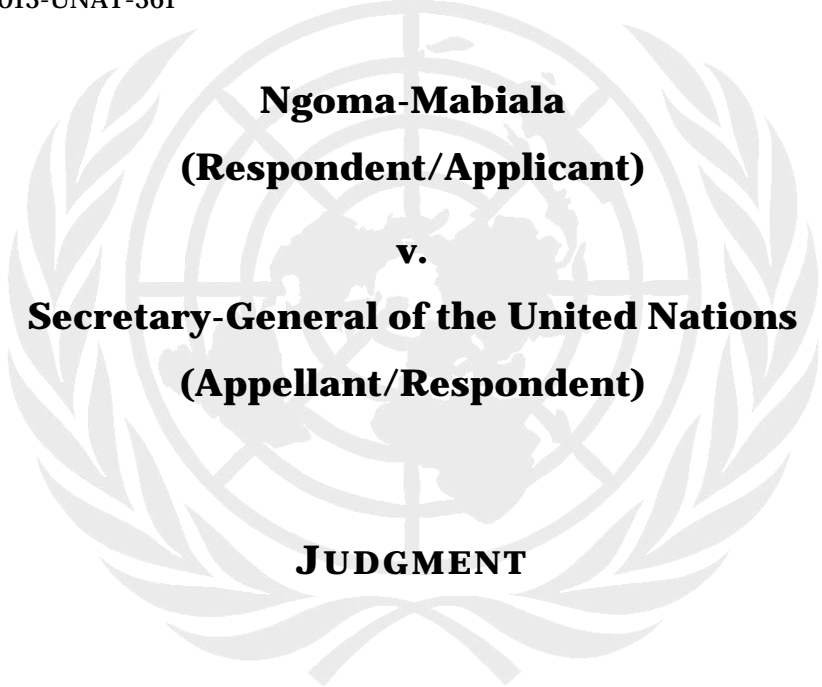




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-361



**Ngoma-Mabiala
(Respondent/Applicant)**
v.
**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Richard Lussick
Judge Rosalyn Chapman

Case No.: 2012-405

Date: 17 October 2013

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Robbie Leighton

Counsel for Appellant/Respondent: Stéphanie Cartier

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/134, issued by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 6 September 2012 in the case of *Ngoma-Mabiala v. Secretary-General of the United Nations*. The Secretary-General appealed on 5 November 2012, and Mr. Ernest Ngoma-Mabiala answered on 20 December 2012.

Facts and Procedure

2. Mr. Ngoma-Mabiala joined the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) in February 2005 as a Telephone Billing Clerk at Grade GL-4B, on an appointment under the 300-series Staff Rules.

3. In November 2008, a post-reclassification exercise at MONUC revealed that Mr. Ngoma-Mabiala “appeared to be a beneficiary of the reclassification process”.¹ Mr. Ngoma-Mabiala’s December 2008 payslip reflected his retroactive upgrade to GL-5A in the form of additional payment for the months July 2007 to November 2008.

4. Effective 1 March 2009, Mr. Ngoma-Mabiala was re-appointed to Grade GL-5/7, in recognition of completing four years of service.

5. By e-mail dated 20 July 2009, a Human Resources Officer, MONUC, Kinshasa, requested issuance of a corrected Personnel Action for Mr. Ngoma-Mabiala and amendment of his contract, on the ground that Mr. Ngoma-Mabiala’s post had been mistakenly reclassified. The corrected Personnel Action, which specified the periods during which overpayment occurred, was forwarded to the Finance Department which promptly began recovery of the “overpayment” in monthly installments, commencing August 2009.

6. According to Mr. Ngoma-Mabiala, he received no formal notification of the purported administrative error and the resulting decision to recover overpayment, nor did he sign an amended contract. It was only after his resignation and at the time of his exit formalities in August 2009 that he was orally notified of the process of recovery of overpayment and the alleged misclassification of his grade.

¹ Impugned Judgment, para. 4.

7. Upon receipt of his final pay slip, Mr. Ngoma-Mabiala noted that his post was recorded as GL-4/6 instead of GL-5/7 and that the sum of USD 400 had been deducted from his pay. Mr. Ngoma-Mabiala was unable to obtain any official explanation of these decisions.

8. On 7 April 2011, Mr. Ngoma-Mabiala was employed by the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo as a Supply/Fuel Assistant at grade GL-4/6 on an appointment under the 100-series Staff Rules. While his April 2011 payslip reflected the appropriate remuneration for his grade under the new appointment, his May 2011 payslip reflected a further deduction of USD 852.30.

9. In response to his inquiries, Mr. Ngoma-Mabiala was advised, on 2 June 2011, that the sum of USD 400 initially deducted in August 2009, together with the final entitlements due to him upon his separation from the Organization in August 2009 (which he had not received), was insufficient to cover the outstanding overpayment he owed to the Organization. The sum of USD 852.30 was the balance that the Organization sought to recover upon his re-employment.

10. On 22 July 2011, Mr. Ngoma-Mabiala filed an application with the UNDT, contesting “the mode of recovery of the overpayment without formal notification or an amended contract” and seeking “reimbursement of the sum deducted as well as compensation for moral damages”.²

11. On 27 July 2011, the Secretary-General filed a reply challenging the receivability of the application and requesting that the UNDT consider receivability as a preliminary issue. By Order No. 100 (NBI/2011), the UNDT granted the application and ordered Mr. Ngoma-Mabiala to file a response on the receivability issue.

12. On 6 September 2012, the UNDT rendered Judgment No. UNDT/2012/134. The UNDT dismissed the application as not receivable on the ground that Mr. Ngoma-Mabiala had failed to request management evaluation. However, in paragraphs 25 to 36 of its Judgment, the UNDT made “Observations” on the merits of the case, concluding that the Administration had made certain mistakes which deprived Mr. Ngoma-Mabiala of his rights.

² Impugned Judgment, para. 16.

Submissions

The Secretary-General's Appeal

13. The Secretary General's core submission to the Appeals Tribunal is that while the UNDT expressly acknowledged (as recited in paragraph 36 of its Judgment) that it could not "make any substantive determination on the matter" of the deductions from Mr. Ngoma-Mabiala's salary by reason of its lack of jurisdiction in the absence of a management evaluation request, the UNDT nonetheless proceeded to embark on a consideration of the merits of Mr. Ngoma-Mabiala's application.

14. The Secretary-General argues that the Dispute Tribunal made negative observations regarding the manner in which the Administration handled Mr. Ngoma-Mabiala's case when the Secretary-General was not given an opportunity to respond to the issues which were the subject of the Dispute Tribunal's "Observations". Thus, the Secretary General contends that the Dispute Tribunal's actions constituted, *inter alia*, an error in law and an excess of jurisdiction on its part.

Mr. Ngoma-Mabiala's Answer

15. Mr. Ngoma-Mabiala submits that the Secretary-General's appeal is not receivable as there are no grounds upon which to appeal pursuant to Article 2(1) of the Statute of the Appeals Tribunal. In accordance with the jurisprudence of the Appeals Tribunal, a party in whose favour a case has been decided "is not permitted to appeal against the judgment on legal or academic grounds".³

16. Mr. Ngoma-Mabiala contends that the present case can be distinguished from the situation which presented in *Wilson*⁴ where comments on the merits of the case made by the Dispute Tribunal were redacted by the Appeals Tribunal on appeal, in circumstances in which Mr. Wilson had unequivocally withdrawn his application to the UNDT. Mr. Ngoma-Mabiala argues that the Dispute Tribunal's "observations" merely represented "some advice to an unrepresented local staff member whose application demonstrated a failure to understand the procedure of the [Organization's] internal justice system".

³ *Sefraoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-048. Mr. Ngoma-Mabiala further relies on the decision of this Tribunal in *Rasul v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-077.

⁴ *Wilson v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-235.

Considerations

17. After consideration of the relevant facts and legal submissions which pertained to Mr. Ngoma-Mabiala's application, the Dispute Tribunal concluded that the administrative decision contested by Mr. Ngoma-Mabiala was not "exempt from management evaluation". The Dispute Tribunal further stated "since the Applicant has not exhausted this otherwise mandatory first step of requesting a management evaluation, the jurisdiction of the Tribunal cannot yet be invoked. The Tribunal has no choice but to reject the present claim as not receivable." This finding, namely that the Dispute Tribunal did not have jurisdiction to embark upon a consideration of Mr. Ngoma-Mabiala's application, was not appealed by Mr. Ngoma-Mabiala. The Secretary-General, however, appeals a discrete issue, namely the "Observations" recorded at paragraphs 25 to 36 of the Judgment.

18. Having regard to the submissions made by the Secretary-General, and the answer filed by Mr. Ngoma-Mabiala, the issues to be decided are:

1) Whether the "Observations" set out at paragraphs 25 to 36 of the UNDT Judgment are properly the subject of an appeal by the Secretary-General; and

2) If properly the subject of an appeal, whether those "Observations" ought to be struck from the UNDT Judgment, as requested by the Secretary-General.

19. In the first instance, we are satisfied that the Secretary-General, who was the beneficiary of a Judgment in his favour from the Dispute Tribunal on the receivability issue, is entitled to appeal to this Tribunal regarding the matters which were the subject of the Dispute Tribunal's "Observations" at paragraph 25 to 36 of its Judgment.

20. In our view, there are a number of factors in the present case which distinguish it from the Appeals Tribunal's jurisprudence in *Sefraoui* and *Rasul*.

21. Firstly, the "Observations" were arrived at in circumstances where the Secretary-General had specifically limited his response to Mr. Ngoma-Mabiala's application to the issue of receivability. On 27 July 2011, the Secretary General applied pursuant to Article 19 of the UNDT Statute "for leave to have receivability considered as a preliminary issue", stating:

... Article 19 of the Rules of Procedure provides that the Tribunal may issue any order or direction which is appropriate for the fair and expeditious disposal of the

case. To that end, the Respondent applies for leave to submit a reply on the issue of receivability. In the interests of judicial economy, the Respondent further requests that this issue be dealt with as a preliminary matter by the Tribunal. Such an approach would achieve the fair and expeditious disposal of the proceedings and do justice between the parties.

... Subject to the Tribunal's ruling on the above matter, the Respondent reserves the right to file a further submission addressing the merits of the Applicant's claim.

22. Thus from 27 July 2011, the Dispute Tribunal was on notice of the approach being adopted by the Secretary General with regard to Mr. Ngoma-Mabiala's application. Moreover, the Dispute Tribunal acceded to the Secretary-General's request and ordered Mr. Ngoma-Mabiala "to file a response on the receivability issue".

23. Secondly, the UNDT effectively embarked on a consideration of the merits of Mr. Ngoma-Mabiala's case and purported to make findings of fact and analyzed those factual findings against the then applicable Staff Rules.

24. In *Wilson*,⁵ we stated:

The UNDT erred in law and went beyond its jurisdiction in effectively embarking on a consideration of the merits of the case and in speculating about the Appellant's motivation in bringing his application, in circumstances where it is clear from the Dispute Tribunal Judge's "Considerations" that the UNDT was not *in fact* adjudicating on the matter in the context of Article 10(6) of the UNDT Statute, something that the Dispute Tribunal Judge would be entitled to do if he had embarked on a consideration of the merits with the intention of arriving at a finding thereon. The Appeals Tribunal rejects the Respondent's submission that the manner in which the UNDT granted the withdrawal request was in accordance with Article 19 of the UNDT Rules of Procedure and we find that, save for recording that the application had been withdrawn, the Order did not accord with either the letter or spirit of Article 19.

25. Applying the approach we adopted in *Wilson* to the circumstances of the present case, we are satisfied that the UNDT overstepped the mark to a significant degree in effectively recording, as part of its Judgment, "Observations" on the Administration's handling of the issue of deductions from Mr. Ngoma-Mabiala's salary. In light of its determination on the issue of receivability, the Dispute Tribunal had no jurisdiction to make the "Observations" in the manner in which it did. Accordingly we will allow the Secretary-General's appeal.

⁵ *Wilson, supra*, para. 13.

Judgment

26. It is hereby ordered that the title “Observations” and paragraphs 25 to 36 shall be redacted from UNDT Judgment No. UNDT/2012/134.

Original and Authoritative Version: English

Dated this 17th day of October 2013 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Chapman

Entered in the Register on this 19th day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar