



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

Judgment No. 2013-UNAT-300

**Wamalala
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Richard Lussick Judge Rosalyn Chapman
Case No.:	2012-332
Date of Judgment:	28 March 2013
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant: Miles Hastie

Counsel for Appellant/Respondent: Simon Thomas

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations on 15 June 2012 against Judgment No. UNDT/2012/052, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 17 April 2012 in *Wamalala v. Secretary-General of the United Nations*.

Facts and Procedure

2. Mr. Gaston Nkulu Wamalala is a staff member of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUSCO). On 13 February 2009, he was involved in a road traffic accident while traveling in a United Nations' military vehicle. That same day, he was taken to a Level 3 hospital in the Democratic Republic of the Congo (DRC), and on 18 February 2009, he was evacuated to a Level 4 hospital in South Africa. After he was admitted to the Level 4 hospital, he underwent emergency surgery which included above-knee amputation of his right leg.

3. By claim form dated 1 July 2009, Mr. Wamalala submitted a claim to the Advisory Board on Compensation Claims (ABCC) for compensation under Appendix D to the Staff Rules. On 25 June 2010, the ABCC recommended, inter alia, that Mr. Wamalala's injuries be recognized as attributable to the performance of official duties on behalf of the United Nations and that he receive compensation in the amount of USD 49,114.03. On 17 August 2010, the recommendation was approved by the Controller, on behalf of the Secretary-General.

4. On 23 September 2011, Mr. Wamalala filed an application before the UNDT challenging the award for compensation by the Secretary-General based on the recommendation of the ABCC. In addition to that, he added a claim for compensation for moral/non-pecuniary damages in the amount of three years' net base salary, fixed at USD 45,000 "for pain and suffering, and the gross negligence of the Administration in failing to adequately ensure the safety and security of the Applicant through his service and treatment".¹

5. On 23 February 2012, the Secretary-General filed a "Motion for Leave to Have Receivability Considered as a Preliminary Issue". The UNDT disposed of the motion on 17 April 2012. The UNDT found that under Staff Rule 11.2(b), Mr. Wamalala was not required to

¹ Mr. Wamalala's application before the UNDT, para. 43.

request management evaluation of the Secretary-General's decision to award compensation in the amount of USD 49,114.03, since this decision was based on the ABCC's recommendation. It further found that the claim relating to negligence and the claim relating to the amount of compensation did not constitute separate claims, and should be determined together. The UNDT therefore concluded that the application was receivable and that it had jurisdiction to entertain it.

6. The Secretary-General appealed the UNDT Judgment on 15 June 2012 and Mr. Wamalala filed his answer on 21 August 2012.

Submissions

Secretary-General's Appeal

7. The Secretary-General submits that the present appeal is receivable. He contends that the UNDT erred in law and exceeded its competence by finding Mr. Wamalala's claim of negligence receivable. It is his understanding of the Appeals Tribunal's jurisprudence that the Appeals Tribunal will consider interlocutory appeals where the decision on receivability turns on a procedural matter that has already been settled by the Appeals Tribunal. The question of whether or not management evaluation is a mandatory first step in the appeals process has been settled in light of the Appeals Tribunal's jurisprudence, and given Mr. Wamalala's failure to request management evaluation of his claim of negligence, the appeal is receivable.

8. The Secretary-General contends that Mr. Wamalala was not entitled to make a separate claim of gross negligence either within or outside the framework of Appendix D. Under Appendix D, no adjustment is made to compensation for service-incurred injury, illness or death for the alleged negligence of either party. The conduct of the Organization and the staff member is not examined in order to determine an increase or decrease in compensation. Furthermore, Mr. Wamalala was not entitled to make his claim of negligence outside the framework of Appendix D as this is expressly excluded by the Staff Rules.

9. In the alternative, should the Appeals Tribunal find that Mr. Wamalala's claim of gross negligence constitutes a separate basis for compensation outside the framework of Appendix D, the Secretary-General submits that it was not receivable since Mr. Wamalala failed to request management evaluation.

10. The Secretary-General requests that the Appeals Tribunal overturn the UNDT Judgment and find Mr. Wamalala's application before the UNDT not receivable to the extent that it relates to a claim for conduct constituting gross negligence.

Mr. Wamalala's Answer

11. Mr. Wamalala submits that the appeal is not receivable. The Secretary-General misapprehends the law concerning interlocutory appeals. The question is not whether the issue is procedural or whether a party believes that the UNDT reached the wrong conclusion. It is well established jurisprudence that only appeals against final judgments are receivable. The Appeals Tribunal has distinguished between cases where the UNDT accepted receivability challenges and cases where it rejected receivability challenges. Receivability objections that are accepted terminate the application and an appeal must be launched immediately. Receivability challenges that are rejected do not prevent the Administration from launching an appeal against the final judgment. In the present case, the Organization may appeal the final judgment.

12. Mr. Wamalala submits that the UNDT did not err in finding that there were not two separate claims, but that there were two heads of damages flowing from the same events. It was within the jurisdiction of the UNDT to characterize the claim and determine that the two issues were interrelated. The decision is closely related to the merits and the claims should proceed to trial.

13. Mr. Wamalala submits that, contrary to the Secretary-General's contention, Appendix D benefits are not exhaustive. Article 3 of Appendix D limits compensation for rights provided for under Appendix D, to the amounts specified in Appendix D. It does not, however, divest a staff member of all his or her other rights if he or she chooses to make an Appendix D claim.

14. Mr. Wamalala contends that the UNDT correctly found that management evaluation was not required. The ABCC's responsibilities include consultative advice on "any matter connected with the implementation and administration of these rules". This advice replaces that which might be given by the lawyers in the Management Evaluation Unit who have no medical/technical experience. It is unclear what purpose management evaluation would serve in these circumstances. If independent heads of damages require independent evaluation, pecuniary and non-pecuniary damages could never be awarded in the same case.

15. Mr. Wamalala requests that the Appeals Tribunal reject the appeal.

Considerations

Is this appeal receivable?

16. It emerges from our jurisprudence that, in the view of the Appeals Tribunal, only appeals against final judgments are receivable. This Tribunal is firmly of the view that cases before the UNDT would seldom proceed if either party were able to appeal to the Appeals Tribunal when dissatisfied with interlocutory decisions made during the course of the proceedings.

17. 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.

18. However, the Appeals Tribunal has held in *Tadonki*,² *Onana*,³ *Kasmani*⁴ and *Bertucci*⁵ that there may be exceptions to the general rule that only appeals against final judgments are receivable. Accordingly, an interlocutory appeal is receivable in cases where the UNDT has clearly exceeded its jurisdiction or competence.

19. Even then, not every appeal against a decision by the UNDT concerning its jurisdiction or competence will be receivable. In *Wasserstrom*, the Appeals Tribunal sought to limit the receivability of appeals against decisions by the UNDT concerning its jurisdiction or competence:

... As stated in *Bertucci*, there may be exceptions to the general rule that only appeals against final judgments are receivable. Whether an interlocutory appeal will be receivable depends on the subject-matter and consequences of the impugned decision. As established in *Bertucci*, an interlocutory appeal is receivable where the UNDT has clearly exceeded its jurisdiction or competence. This will not be the case in every decision by the

² *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.

³ *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008.

⁴ *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011.

⁵ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062 (full bench, Judge Boyko dissenting).

UNDT concerning its jurisdiction or competence. The general rule that only appeals against final judgments are receivable does not apply where the UNDT dismisses a case on the grounds that it is not receivable under Article 8 of the UNDT statute, as the case cannot proceed any further and there is in effect a final judgment.

... The receivability of an interlocutory appeal from a decision of the UNDT allowing a case to proceed on the basis that it falls within its competence under the UNDT Statute is a different matter. If the UNDT errs in law in making this decision and the issue can be properly raised later in an appeal against the final judgment on the merits, there is no need to allow an appeal against the interlocutory decision.

... In the present case, the Appeals Tribunal sees no reason to depart from the general rule that only appeals against final judgments are receivable. The question of whether the determination made by the Director of the Ethics Office that no retaliation had occurred constitutes an administrative decision goes directly to the merits of the case. It requires adjudication on the merits and can therefore not be subject to an interlocutory appeal. The alleged lack of jurisdiction of the UNDT is not clearly established in this case and the issue cannot be decided before the UNDT has rendered a judgment on the merits of the case.⁶

20. On the other hand, in *Ajdini et al.*⁷ and similar cases touching on jurisdictional matters such as whether a staff member has filed a timely request for management evaluation prior to initiating formal litigation, or waiver of time-limits for management evaluation, the appeals of such UNDT Judgments and even Orders were held to be receivable.⁸

21. In the case before us, the Secretary-General submits that a staff member is required to request management evaluation of certain administrative decisions prior to seeking the UNDT's review of such decisions. In this case, clearly an applicant has not submitted the contested or impugned decision for management evaluation prior to filing an application before the UNDT. The UNDT is consequently not competent to determine the matter.

22. In the view of this Tribunal, the Secretary-General has clearly established the lack of jurisdiction of the UNDT and hence we make an exception to the general rule that only appeals against final decisions are receivable. The issue of jurisdiction in this instant case does not go

⁶ *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-060.

⁷ *Ajdini et al. v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108.

⁸ See i.e. *Bali v. Secretary-General of the United Nations*, Judgment 2012-UNAT-244; *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-230; *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008.

directly to the merits of the case as in *Wasserstrom*. Therefore, there is the need to receive the appeal now rather than wait for the issue to be raised in an appeal against the final judgment. Accordingly, we hold that the appeal is receivable.

Merits

Did the UNDT err in finding that there was a single claim with two heads of damages?

23. The Secretary-General challenges the UNDT's finding that Mr. Wamalala's claim for gross negligence constituted a separate basis for compensation within his "single claim" for compensation. He submits that a claim of negligence is not possible either *within* or *outside* the framework of Appendix D.

24. Appendix D contains the rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations. These rules apply to all staff members appointed by the Secretary-General with the exception of locally recruited staff covered by applicable national social security schemes, interns, and persons serving on special service agreements, unless otherwise explicitly provided for by the terms of their appointments.⁹

25. The UNDT's finding that there was one single claim with two heads of damages, one relating to the gross negligence by the Administration and one relating to the amount of compensation awarded to Mr. Wamalala, is seriously flawed. The Appeals Tribunal is of the view that Mr. Wamalala's claim of negligence constitutes a separate basis for compensation outside the framework of Appendix D, which is a workers' compensation system. A workers' compensation system is a no fault insurance or scheme whereby employers must cover occupational injury or illness. Employees do not have to prove employers negligence in order to obtain benefits.

26. The goal of a workers' compensation system is to reduce disputes and litigation arising from work-related injuries and illnesses. The system also sets fixed awards for employees who suffer work-related injuries or illnesses.

⁹ Appendix D, Article 1.

27. Accordingly, a claim of gross negligence against the Administration is a separate action which cannot be included in a claim made by a staff member under Appendix D.

Is the claim of gross negligence receivable?

28. The Secretary-General contends that Mr. Wamalala has not submitted his claim of gross negligence for management evaluation and that the UNDT therefore erred in finding that it was receivable.

29. Under Staff Rule 11.2(a), a staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent Regulations and Rules pursuant to Staff Rule 11.1(a) shall, as a first step, submit to the Secretary-General in writing a request for management evaluation of the administrative decision.

30. Under the UNDT Statute, the Dispute Tribunal is not competent to hear and pass judgment on a claim for gross negligence against the Secretary-General that has not been the subject of an administrative decision and thereafter, management evaluation. Under Article 8(1)(c) of the UNDT Statute, an application shall be receivable if “[a]n applicant has previously submitted the contested administrative decision for management evaluation, where required”.

31. Mr. Wamalala did not submit his claim of gross negligence to the Secretary-General for consideration and decision and subsequently for management evaluation.

32. It is settled case law of the Appeals Tribunal that a request for management evaluation is a mandatory first step in the appeal process. Accordingly, since Mr. Wamalala failed to request management evaluation, his claim is not receivable *ratione materiae*, and the claim of gross negligence by the Administration is not receivable by the UNDT.

Judgment

33. For the foregoing reasons, the appeal is allowed. The UNDT’s finding that the claim of gross negligence is receivable by the UNDT is set aside.

Original and Authoritative Version: English

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

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Chapman

Entered in the Register on 24th day of May 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar