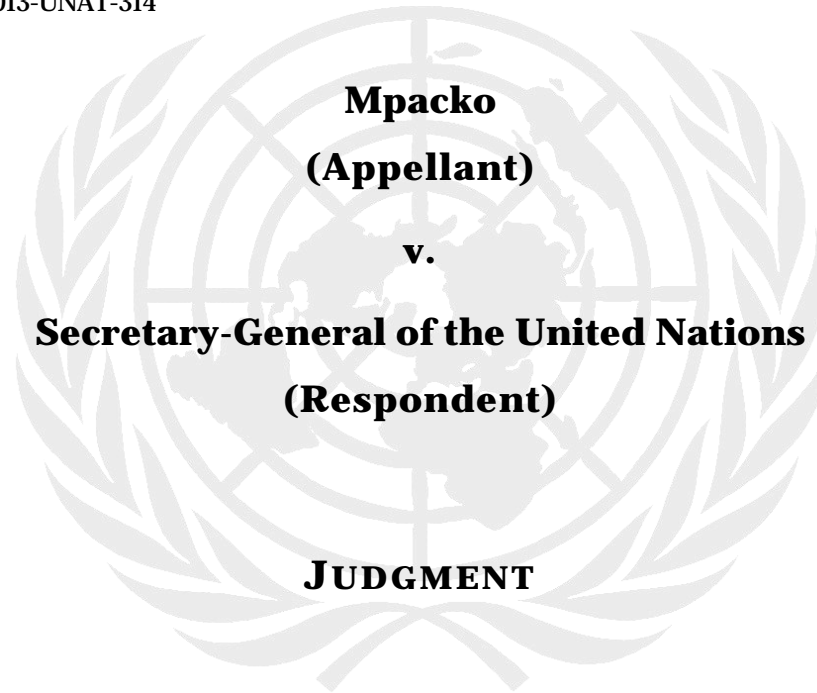




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-314



Before:	Judge Rosalyn Chapman, Presiding Judge Inés Weinberg de Roca Judge Mary Faherty
Case No.:	2012-354
Date:	28 March 2013
Registrar:	Weicheng Lin

Counsel for Appellant:	Bruce A. Coane/Lauren T. Schlossberg
Counsel for Respondent:	Stéphanie Cartier

1. On 31 May 2012, the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York issued Judgment No. UNDT/2012/081, in the case of *Mpacko v. Secretary-General of the United Nations*, denying the application of Ms. Adele Maloka Mpacko for suspension of action pending management evaluation of the decision to reassign her.

Facts and Procedure

2. Briefly stated, Ms. Mpacko is an Associate Civil Affairs Officer on a P-2 post originally assigned to the Civil Affairs Section of the United Nations Stabilization Mission in Haiti (MINUSTAH). A couple of years ago, she filed a complaint against her supervisor, the Chief of the Civil Affairs Section (Chief). Subsequently, Ms. Mpacko withdrew her complaint, gave the Chief a written apology, and was reassigned to the Contracts Management Unit, MINUSTAH, where she remained from September 2010 until April 2011. Ms. Mpacko alleges these events were all part of an agreed-to settlement of her complaint, and that settlement is binding on the Secretary-General. In May 2011, Ms. Mpacko was reassigned to the Procurement Section, MINUSTAH, where she was at the time she brought her application for suspension of action.

3. On 9 December 2011, Ms. Mpacko's supervisor in the Procurement Section advised her of the "ongoing MINUSTAH downsizing" and that her "current post has been requested to be returned to Civil [A]ffairs effective from 01 January 2012". Ms. Mpacko was further advised that she was being "tentatively placed on a Procurement Officer post to 30 June 2012" and that her "continued occupation of the Procurement Officer post beyond 30 June 2012 w[ould] be dependent upon [her] clearance as Procurement Officer or upon receipt of further favorable administrative and professional instructions in this regard".

4. On 13 April 2012, the Director of Mission Support advised Ms. Mpacko that she was "being re-deployed from Procurement Section, Santo Domingo[,] to Civil Affairs Section, Port-au-Prince ... effective 1 June 2012".

5. On 17 April 2012, Ms. Mpacko requested that the Director of Mission Support reconsider his decision. On 30 April 2012, Ms. Mpacko was advised that when she "was reassigned from the Civil Affairs Section to the Contracts Management Unit and later to the Procurement Section, she continued to encumber the P-2 post that belonged to the Civil Affairs Section. In effect, her post was loaned within the Mission. Following the

decision to downsize the Mission, the Civil Affairs Section requested that the P-2 post encumbered by [her] be returned to them.”¹

6. On 7 May 2012, Ms. Mpacko requested management evaluation of the reassignment decision.

7. On 29 May 2012, Ms. Mpacko filed an application with the UNDT for suspension of action pending management evaluation of the decision to reassign her from the Procurement Section to the Civil Affairs Section, MINUSTAH, effective 1 June 2012. After reviewing Ms. Mpacko’s application, the New York Registry of the Dispute Tribunal advised Ms. Mpacko to submit her application on the proper UNDT form and to file it through the eFiling portal. On 30 May 2012, Ms. Mpacko electronically filed her application for suspension of action pending management evaluation on the proper UNDT form, and the New York Registry transmitted it to the Respondent. The Respondent filed his reply by 2:00 p.m. on 31 May 2012, as directed by the New York Registry.

8. Later on 31 May 2012, the UNDT issued Judgment No. UNDT/2012/081 denying Ms. Mpacko’s application for suspension of action pending management evaluation. In denying the application, the UNDT applied Article 2(2) of the Dispute Tribunal Statute² and determined there was no particular urgency to the application. More specifically, the UNDT concluded that Ms. Mpacko knew of the “final decision” to reassign her effective 1 June 2012, at least six weeks before she brought her application. The UNDT, thus, determined that “[a]ny urgency ... is of [Ms. Mpacko’s] own making”. The UNDT further determined that since “one of the three conditions required for temporary relief under art. 2.2 of the Statute has not been met, [it] need not determine whether the remaining two conditions -- *prima facie* unlawfulness and irreparable damage -- have been satisfied”.

¹ Judgment No. UNDT/2012/081, para. 16.

² Article 2(2) of the UNDT Statute reads: “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.”

9. On 30 July 2012, Ms. Mpacko filed an appeal of Judgment No. UNDT/2012/081 denying her application for suspension of action pending management evaluation. And on 28 September 2012, the Secretary-General filed his answer to the appeal.

Submissions

Ms. Mpacko's Appeal

10. The appeal is receivable by the Appeals Tribunal under Article 2 of the Appeals Tribunal Statute (Statute) because the Appellant asserts that the UNDT erred on questions of law and fact. The UNDT made an error of law in determining the application was not of "particular urgency" and erred in making the factual finding that the Appellant created any "urgency" that might exist. As the Appellant fully explained in her application to the UNDT, there was no certainty in advance of 1 June 2012 that she would be reassigned; but the UNDT did not fully consider the Appellant's explanation.

11. The UNDT also made a procedural error by ending its legal analysis after determining the Appellant had not shown particular urgency and by failing to consider the other two criteria for the issuance of temporary relief under Article 2(2) of the UNDT Statute: *prima facie* unlawfulness and irreparable damage. If the UNDT had considered all three criteria for the issuance of temporary relief, as it was required to, it would have found that the Appellant showed *prima facie* unlawfulness and irreparable damage.

12. The Appellant requests that the Appeals Tribunal "overturn the decision by the [D]ispute [T]ribunal and suspend the action of moving her to the Civil Affairs Unit in Haiti". Alternatively, the Appellant seeks "to be relocated to another division away from" the Chief of the Civil Affairs Section.

Secretary-General's Answer

13. The Secretary-General does not address the merits of Ms. Mpacko's claims. Rather, he contends that the appeal is not receivable because it is an interlocutory appeal in which the Appellant does not assert that the UNDT exceeded its competence or jurisdiction, which is the sole basis for the Appeals Tribunal to consider an interlocutory appeal in the context of an application for suspension of action pending management evaluation. The Appellant merely challenges the merits of the UNDT's decision to deny her temporary relief.

Considerations

14. Preliminarily, this Tribunal denies the Appellant's request for an oral hearing, finding there is no need for further clarification of the issues arising from her appeal, pursuant to Articles 2(5) and 8(3) of the Statute.

15. "The Statute of the Appeals Tribunal does not clarify whether the Appeals Tribunal may hear an appeal only from a final judgment of the UNDT on the merits, or whether an interlocutory decision made during the course of the UNDT proceedings may also be considered a judgment subject to appeal."³ Generally, this Tribunal has held that "only appeals against final judgments will be receivable".⁴ Nevertheless, when it is clear that the UNDT has exceeded its jurisdiction or competence, an interlocutory appeal will be receivable.⁵

16. When considering an appeal of a judgment granting an application for the suspension of action pending management evaluation, this Tribunal has noted:

... General Assembly resolution 63/253 states in paragraph 28 "that the United Nations Dispute Tribunal and the United Nations Appeals Tribunal shall not have any powers beyond those conferred under their respective statutes". The Statute of the Appeals Tribunal approved in this resolution establishes in its article 2 a general principle of law, the right of parties to file an appeal against the "judgments" rendered by the Dispute Tribunal. ...

... [T]he exclusion of the right to appeal a decision on the suspension of action on an administrative decision constitutes an exception to the general principle of law of the right of appeal and should therefore be interpreted strictly. It thus follows that this exception can be applied only to jurisdictional decisions *ordering* the suspension of implementation of an administrative decision when a management evaluation is ongoing. ...

...

... It therefore falls to the Appeals Tribunal, which wishes to give full effect to the principle affirmed in paragraph 28 of the General Assembly resolution 63/253, to determine, when dealing with an appeal against a jurisdictional decision of the Dispute Tribunal rendered on the basis of article 2, paragraph 2, of the Statute ...

³ *Villamorán v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160, para. 35; *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005, para. 8.

⁴ *Ibid.*

⁵ *Ibid.*

whether, and only whether, the Dispute Tribunal has respected the limits of the competence conferred on it by those provisions. Were the Appeals Tribunal to decide that the Dispute Tribunal had not exceeded its jurisdiction or competence, the appeal would be considered non-receivable[.]⁶

17. On appeal, Ms. Mpacko raises two claims: (1) the Dispute Tribunal erred as a matter of law in determining there was no “particular urgency” for her application and erred in making the factual finding that any urgency that might exist was created by her, since she knew of the reassignment several weeks before she filed her application; and (2) the Dispute Tribunal erred procedurally in considering only one of the three criteria for determining whether cause exists to grant temporary relief under Article 2(2) of the UNDT Statute. Both of these claims address the merits of the UNDT decision; they do not amount to claims that the Dispute Tribunal exceeded its competence or jurisdiction in denying her application for suspension of action pending management evaluation. And in reviewing the record of this case, it is clear to this Tribunal that the UNDT did not exceed its competence or jurisdiction in issuing Judgment No. UNDT/2012/081, denying Ms. Mpacko’s application for suspension of action. Thus, it is determined that Ms. Mpacko’s appeal is not receivable.

Judgment

18. The appeal is determined to be not receivable.

⁶ *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011, paras. 7, 8 and 10 (emphasis added); see also *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008.

Original and Authoritative Version: English

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

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Faherty

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

(Signed)

Weicheng Lin, Registrar