UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2015-UNAT-507

Porter

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Mary Faherty, Presiding Judge Richard Lussick Judge Inés Weinberg de Roca
Case No.:	2014-577
Date:	26 February 2015
Registrar:	Weicheng Lin

Counsel for Mr. Porter:	Monika Ona Bileris
Counsel for Secretary-General:	Wambui Mwangi

JUDGE MARY FAHERTY, PRESIDING.

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/2013/156, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 4 December 2013 in the case of *Porter v. Secretary-General of the United Nations*. The Secretary-General appealed on 3 February 2014, and Mr. Peter Porter answered on 4 April 2014.

Facts and Procedure

2. The facts as found by the Dispute Tribunal read as follows:[1]

> ... The Applicant is a Security Awareness Induction Training (SAIT) Liaison Officer at the P-3 level with the United Nations Mission for Iraq (UNAMI) [...] rotating regularly between duty stations in Baghdad, Iraq and Amman, Jordan.
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> ... During the course of his duty with UNAMI in Baghdad, sometime in February 2009, the Applicant took ill and was admitted at the infirmary suffering from back-problems, pain, anxiety, and sleep deprivation among other complications.
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> ... The UNAMI Chief Medical Officer (CMO/UNAMI), Dr. Bernhard Lennartz, diagnosed him as suffering from extreme stress. Dr. Lennartz recommended that the Applicant should take some time off work to see his doctor in Amman, Jordan.
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> ... Around the first week of May of 2011,[2] the Applicant saw Dr. Adnan Takriti, a psychiatrist in Amman, Jordan. Dr. Takriti advised him to take some time off work to recuperate and cleared the Applicant to return to work after one month. Dr. Takriti's medical report was sent to Dr. Lennartz on 11 May 2009 who forwarded it to the mission and the Medical Services Division (MSD) in New York.
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> ... Having been advised to take time off work, the Applicant applied for two weeks certified sick leave from 11 May 2009 which his doctor agreed to. For his sick leave, he was authorized by MSD and UNAMI to be away from the mission area and to travel back to his home country, Canada. He paid for his ticket and travelled to Canada on 21 May 2009.
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> ... The Applicant was advised by Dr. Lennartz that before he could return to work, he needed to obtain medical clearance from Dr. Ardash Tiwathia of MSD at Headquarters. He was asked to provide a medical report to Dr. Tiwathia prior to returning from leave.

[1] Impugned Judgment, paras. 1-41.
[2] The year here should be 2009.

... On 3 June 2009, MSD advised the Applicant to remain on leave until he received medical clearance and that he needed to get a psychiatric report. The Applicant then proceeded to arrange a doctor's appointment for purposes of obtaining the needed report.

... The doctors that the Applicant first saw in Canada referred him to Dr. Maurice Boulay who was a psychologist. Therapy sessions were scheduled and conducted on a continuous basis starting 7 June 2009 and went on for a period of about four months.

... Dr. Boulay then sent his medical Report to Dr. Lennartz and Dr. Tiwathia advising that the Applicant was anxious to return to work as quickly as possible but that he should be posted to a "non-conflict" area as he had had "more than his fair share of being exposed to situations which were life threatening".

... On 30 August 2009, Dr. Boulay advised Dr. Lennartz that the Applicant was anxious to return to work, and could return though he reiterated his recommendation that the Applicant return to a non-conflict zone.

... On 15 September 2009, Dr. Lennartz wrote an email to Dr. Boulay informing him to advise the Applicant to see a psychiatrist to obtain a psychiatric report.

... On 30 September, Dr. Lennartz wrote to the Applicant informing him that Dr. Boulay, being a psychologist was not considered a medical practitioner or doctor and that MSD would require, other than Dr. Boulay's report, a medical report from a psychiatrist.

... On 1 October 2009 the Applicant wrote the following email to various senior officials in UNAMI and MSD:

> Dear UN Staff members,
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> Can someone please advise some guidance on this issue or is it late or am I terminated? I was advised a week ago 'to relax', 'get better', 'take time to heal', the UN would take care of me, and now I find that UNAMI wants to terminate my contract as of yesterday, the 30th of September, the same day the [sic] advised me.
>
> I am pushing forward with the request to see the psychiatrist as directed by the UNAMI doctor, I do not understand the difference, as in Canada I have been led to believe the [sic] both are professional and interchangeable.
>
> Irregadless [sic] I have followed the direction from the mission doctor, I have not returned to the mission prior to any clearance and am now awaiting an appointment with a psychiatrist.
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> Also, as I advised earlier, I will return today if I am provided clearance or allowed to return.

... On the same day, the Applicant also wrote to Dr. Lennartz expressing his surprise on realizing that he had been terminated given that he had been following instructions given to him. He explained that he only saw Dr. Boulay because he was asked to do so by his Canadian doctor and that if he had been advised that as a psychologist Dr. Boulay was not considered a medical doctor, he would have made other arrangements and saved himself considerable expenses. He also expressed confusion because Dr. Lennartz had earlier advised him to continue seeing Dr. Boulay.

... On 17 October 2009, Ms. Jacinta Muhoho, Chief, Human Resources Section at UNAMI wrote to the Applicant informing him among other things, that his contract had not been terminated but that his salary had only been placed on hold temporarily pending clearance of his medical leave by MSD.

... The Applicant then booked an initial appointment with a psychiatrist, Dr. Adelman on 19 October 2009 and the results of his appointments were forwarded to Dr. Tiwathia, Dr. Lennartz and other relevant personnel as was required.

... Dr. Adelman found that the Applicant had a mild version of Post-Traumatic Stress Disorder (PTSD), which he said was a normal reaction for a person who had been working in conflict zones. The doctor cleared him for work but not in a conflict zone.

... After the submission of the Applicant's psychiatric report on 20 November 2009, Dr. Tiwathia wrote to Mr. Robin Sellers on 30 November 2009, Chief of Mission Support, UNAMI, informing him that the Applicant was medically cleared to return to the mission but that he may only be assigned to Jordan and Kuwait and not Iraq.

... On 13 January 2010, Dr. Lennartz wrote to the Applicant informing him that he had been cleared to return to mission as of 30 November 2009, and stated that he was surprised that the Applicant had not yet been informed by MSD about his clearance.

... By a fax dated 1 April 2010, Dr. Tiwathia informed Mr. Sellers that all medical reports from the Applicant's attending doctors had been reviewed by MSD and that based on the medical information provided, the Applicant was "NOT medically fit to return to UNAMI."

... By a memorandum dated 7 April 2010 from Ms. Muhoho, the Applicant was informed that effective 17 February 2010, he had exhausted his sick leave entitlements. She informed him further that UNAMI would make a request to the United Nations Joint Staff Pension Fund (UNJSPF) for him to be awarded a disability benefit.

... On 9 April 2010, the Applicant wrote to Dr. Tiwathia expressing his displeasure and discomfort over the fact that he was still not cleared to return to work as per his doctors' recommendations. Dr. Tiwathia responded by informing him to file a compensation claim with the Advisory Board on Compensation Claims (ABCC).

... On 7 June 2010, Dr. Boulay wrote to Dr. Tiwathia again informing her that it was his professional opinion that the Applicant was cleared to return to work and that "even a short return to duty would have been therapeutic in itself." He wrote:

> As requested I am sending you a follow up report on Mr. Porter's condition. I saw Mr. Porter on Tuesday, June 1, 2010, after he came back from a trip to Jordan and Amman. Although he appeared to have continued to maintain gains since I last saw him, he was somewhat upset at finding out that he will no longer be working with the UN at the end of this month. As you know, Dr. Adelman and I had come to the conclusion that [the Applicant] was fit to return to duty in a non-conflict area where he would have been able to benefit from ongoing psychological support. What might not have been made clear was that even a short return to duty would have been therapeutic in itself ....

... On 29 June 2010, the Applicant filed a compensation claim with the ABCC detailing his perspective of what had led to his ailment and contending that his ailments were service-incurred. He explained in detail the kind of work environment he had been exposed to over the years working in United Nations missions in conflict zones and which he and his doctors concluded were largely responsible for his illnesses. He also noted in the compensation claim that he had never been advised when his sick leave was exhausted and that his pay had been stopped.

... By letter dated 6 August 2010 from Mr. Masaki Sato, Chief, Asia and Middle East Section, Field Personnel Division, Department of Field Support, the Applicant was informed that as of 14 February 2010 he had exhausted his sick leave at full pay and that consequently, starting 15 February 2010, had been placed on sick leave at half pay. He was also informed that he did not receive any salary in June 2010 since he had been paid his regular salary until May 2010 while it ought to have been at half pay rate.

... By memorandum dated 12 January 2011, from the Medical Director of MSD in New York to the Administrative Officer at UNAMI, it was indicated that the Applicant's sick leave certification had been approved through to 31 January 2011.

... On 21 February 2011, the Applicant received a Letter of Appointment (LoA) that had been signed by Mr. Sato on 21 January 2011. The LoA indicated the term of appointment as 1 October 2010 to 23 November 2010, a period of 1 month and 23 days. This showed that his appointment had ended on 23 November 2010.

... On 23 February 2011, the Applicant wrote to Ms. Muhoho and Mr. Sato requesting for an explanation regarding a letter that he had received indicating that his contract had been terminated. Among other things, he made inquiries as to why he was notified of his termination towards the end of February 2011 when the notice of termination showed that his contract had expired in November 2010. He also asked to know why the reason indicated for his termination was that he was "disabled" when his doctors had advised that he was healthy and fit for work.

> ... On 29 March 2011, Mr. Sato sent the Applicant a letter stating:
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> > ... I would like to inform you that we have given full consideration to your situation and have explored current and potential vacancies to place you in another field mission. Regrettably, we have exhausted all available options. ... in order to keep you on actual contractual status we will place you on Special Leave Without Pay (SLWOP) upon the expiration of your sick leave entitlement from 24 November 2010 until the ABCC finalizes [the] review of your case and issues its decision.
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> ... On different dates between May and July 2011, the Applicant wrote to Mr. Sato essentially protesting that he was receiving conflicting information from the Administration regarding his contractual status with UNAMI. He arranged to meet with Mr. Sato on 16 July 2011 and travelled from Ontario to New York although according to the Applicant, the meeting was cancelled by Mr. Sato at the last minute.
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> ... On 21 July 2011, the Applicant was medically cleared to return to UNAMI in either Jordan or Kuwait. The Applicant was informed that he was being sent on mission to Kuwait.
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> ... The Applicant requested that UNAMI pay the airfare for his return to the mission as he had no money and for an advance of USD 10,000 to secure living quarters for his family but he was told to "just return to mission and figure things out from there."
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> ... He eventually returned to UNAMI in Kuwait on 1 August 2011. On arrival in Kuwait, he was told to return to and remain in Amman, Jordan where he still serves as the SAIT Liaison Officer at the P-3 level.
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> ... On 11 August 2011, the Applicant through his legal counsel addressed a letter to the Secretary-General and the Special Representative of the Secretary-General for UNAMI (SRSG/UNAMI) titled "Request for Final Administrative decision".
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> ... No response to the above mentioned letter was received by the Applicant who then filed a request for management evaluation on 28 November 2011. The Management Evaluation Unit (MEU) responded the next day, 29 November 2011 informing him that his claims were not receivable.
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> ... The Applicant filed the present Application on 21 February 2012.
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> ... On 26 March 2012, along with the Reply to the Application, the Respondent also filed a motion requesting to have the issue of receivability in this case decided prior to moving onto the merits.

3. In Judgment No. UNDT/2013/156, the Dispute Tribunal restricted itself to the question of whether Mr. Porter's claims were receivable. It found that Mr. Porter's application satisfied the criteria of receivability set out in Staff Rule 11.2 and Article 8 of the

UNDT Rules of Procedure and therefore was receivable both on substance and in time. In the view of the Dispute Tribunal, "the contested abuse of authority in this case does not arise from a singular, detachable, stand-alone decision by any of the officials in Administration but rather that it is a series of actions and inactions spanning a period of over two years the final of which were in July and August 2011. The Applicant requested management evaluation in time." Having reviewed the chronology of the case, the UNDT found that:

> at no point was the Applicant informed that the Administration would keep him on sick leave for 26 months. There was never a clear final decision given to him on this matter until he found out when he resumed duty in August 2011. The entire period was gravely marred by contradicting decisions, counter-decisions, non-decisions, miscommunications and non-communications all perpetuating the Applicant's confusion as regards his standing in the Organization.[3]

Submissions

The Secretary-General's Appeal

4. While appeals of the UNDT's decisions on receivability should be raised only when appealing the judgments on the merits, the Appeals Tribunal has shown a gradual willingness to consider appeals of decisions by the Dispute Tribunal on receivability when the Dispute Tribunal clearly lacked jurisdiction and the issue of jurisdiction does not go directly to the merits of the case. The present appeal is therefore receivable.

5. The Dispute Tribunal erred in fact in finding that Mr. Porter was "never [given] a clear final decision". Indeed, a final decision that Mr. Porter could not return to UNAMI because he was not medically fit was communicated to him on 1 April 2010, which can be objectively determined by both parties.[4] The fact that he was not returned to service for over two years meant that the May 2009 decision to place him on sick leave and the 1 April 2010 decision not to return him to service were final decisions that were maintained. The subsequent new decision on 21 July 2011 to clear him for work in UNAMI reflected a new policy on the clearance of UNAMI staff, but it did not undermine the finality of the original decision of 1 April 2010. If the UNDT's reasoning is accepted and the necessary

[3] Impugned Judgment, para. 92.
[4] According to the Secretary-General, Ms. Tiwathia notified Mr. Porter that he was not medically fit for service on 7 April 2010. However, the UNDT Judgment shows that this event occurred on 1 April 2010, and not 7 April 2010. We adopt the date established by the Dispute Tribunal.

ongoing consequences flowing from any administrative decision are treated as separate administrative decisions, no claim would ever be time-barred. Such an approach would render deadlines meaningless, is inconsistent with the jurisprudence of the Appeals Tribunal, and denies the Organization any certainty about the finality of its administrative decisions.

6. Mr. Porter made several requests to various parts of the Administration for reconsideration of the decision of 1 April 2010, culminating in his letter to the Secretary-General dated 11 August 2011, seeking a "final administrative decision". The fact that Mr. Porter sought a "final administrative decision" on 11 August 2011 after having already been informed of a final administrative decision on 1 April 2010 does not reset the applicable time limits under Staff Rule 11.2(c). Even if his letter of 11 August 2011 were to be accepted as a request for management evaluation, this request was made almost 16 months after he received notification of the decision on 1 April 2010 that he was not medically fit to return to duty. The date of the administrative decision was clear, as was the deadline for submission of a request for management evaluation. The UNDT thus did not have authority to suspend the time limits applicable for submitting a request for management evaluation.

Mr. Porter's Answer

7. The present appeal is not receivable, as the impugned Judgment is interlocutory in nature. The Secretary-General may appeal the merits of the case, but not its case management.

8. Contrary to the claim made by the Secretary-General, 1 April 2010 could not be considered as the date of the final decision as the Administration was still actively and openly working towards returning Mr. Porter to work and, moreover, Ms. Tiwathia's fax did not give sufficient details as to its finality. Mr. Porter asserts that the final decision was that of 21 July 2011 which cleared him to return to work. That decision led him to recognize that he had to take action and appeal, lest he continue to receive even more conflicting and contradictory decisions and non-decisions.

9. The UNDT correctly determined that the contested case did not arise from any one single date or occasion, as no clear decision was given by any official at any particular time until he resumed duty in August 2011. Before the Dispute Tribunal, Mr. Porter did not contest a single decision; he was contesting "a series of decisions" and "non-decisions".

10. The Dispute Tribunal also correctly determined that Mr. Porter filed a timely request for management evaluation, as the date of the final administrative decision was 21 July 2011, and his appeal on 11 August 2011 was thus timely.

Considerations

Is the Secretary-General's appeal receivable?

11. The Secretary-General appeals the Dispute Tribunal's decision to admit to judicial review Mr. Porter's challenge to:

a) The decision taken by the UNAMI Administration to keep him on medical leave for more than two years after his doctors had recommended that he was fit to return to work;

b) The inaction and/or refusal by the UNAMI Administration to take him back into service for more than two years; and

c) The failure by the Administration to reimburse certain financial claims.

12. The Dispute Tribunal deemed the claims receivable both on substance and in time.

13. The Secretary-General contends that the Dispute Tribunal erred in law and exceeded its competence and jurisdiction in admitting the claims. Specifically, he argues that the UNDT erred:

a) In finding that no final decision was communicated;

b) In finding that Mr. Porter contested a series of actions and inactions over two years;

c) In failing to recognize that successive requests for review did not reset the applicable time limits for management evaluation;

d) In finding the request for management evaluation timely; and

e) In suspending the deadline for management evaluation.

14. The Secretary-General contends that his appeal of the Dispute Tribunal's interlocutory Judgment is receivable by this Tribunal. Mr. Porter argues to the contrary.

15. It is for this Tribunal to determine whether under Article 2 of its Statute it is competent to hear the appeal and whether it is receivable pursuant to the provisions of Article 7 of its Statute.

16. We have consistently stated that the general principle underlying the right of appeal set out in Article 2(1) of our Statute is that only final judgments of the UNDT are appealable.[5]

17. In *Tadonki*, we held that "[o]nly when it is clear that the UNDT has exceeded its jurisdiction will a preliminary matter be receivable".[6]

18. We affirmed this approach in *Bertucci* where we stated:

> In *Tadonki* (No.1), the Appeals Tribunal has emphasized that most interlocutory decisions will not be receivable, for instance, decisions on matters of evidence, procedure, and trial conduct. In *Calvani*, the Appeals Tribunal held that an appeal by the Secretary-General from an interlocutory order of the UNDT for the production of a document was not receivable. It observed that the UNDT had discretionary authority in case management and the production of evidence in the interest of justice and that, should the UNDT have committed an error in ordering the production of a document and have drawn erroneous conclusions in the final judgment resulting from the failure to produce the requested document, it would be for the Secretary-General to appeal that judgment. The Appeals Tribunal has, however, held in *Tadonki* (No.1), *Onana*, and *Kasmani*, that an interlocutory appeal is receivable in cases where the UNDT has clearly exceeded its jurisdiction or competence.[7]

19. In *Wasserstrom*, we stated:

> 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 UNDT concerning its jurisdiction or competence. The general rule that only appeals against final judgments are receivable does not apply where the UNDT

[5] *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.
[6] *Ibid*, para. 11.
[7] *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, para. 21.

> 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.[8]

20. In *Wamalala*, the Appeals Tribunal admitted an interlocutory appeal having found that the applicant in that case "[had] not submitted the contested or impugned decision for management evaluation prior to filing an application before the UNDT". In that case, we held that "the Secretary-General [had] clearly established the lack of jurisdiction of the UNDT".[9]

21. The import of our jurisprudence on the receivability of appeals against interlocutory orders is that the excess of jurisdiction or competence must be "clear" or "manifest".[10] We are not satisfied that that threshold has been met by the Secretary-General, given the circumstances of the present case. Adjudication of the matters complained of by the Secretary-General, notwithstanding that they touch upon the competence of the Dispute Tribunal, is more proper for consideration once a final judgment has been rendered by the Dispute Tribunal, if and when the Secretary-General chooses to appeal. We so find because the matters in issue are interconnected with the merits of the case.

22. We hold that the Secretary-General's appeal is not receivable.

Judgment

23. The appeal is not receivable and is dismissed.

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[8] *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-060, paras. 18-19.
[9] *Wamalala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300.
[10] *El-Komy v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-324; *Bali v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-244; *Hersh v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-243; *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-230; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062; *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-060; and *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Faherty, Presiding	Judge Lussick	Judge Weinberg de Roca

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar