UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2019-UNAT-975

Reilly

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Sabine Knierim Judge John Raymond Murphy
Case Nos.:	2019-1301 & 2019-1302
Date:	25 October 2019
Registrar:	Weicheng Lin

Counsel for Ms. Reilly:	Robert Leighton, OSLA
Counsel for Secretary-General:	Nathalie Defrasne

Reissued for technical reasons on 27 January 2020

JUDGE KANWALDEEP SANDHU, PRESIDING.

Introduction

1. At the date of the filing of her applications before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), the Appellant was a staff member of the United Nations with the Office of the High Commissioner for Human Rights (OHCHR). She filed three applications with the Dispute Tribunal regarding different administrative decisions relating to her treatment as a whistle blower. The three applications were heard by Judge Downing, an *ad litem* judge of the Dispute Tribunal. On 24 May 2019, Judge Downing handed down judgment on the first application. The remaining two applications were awaiting judgment. Prior to judgment being issued on the two applications, the applications were reassigned to Judge Bravo. Judge Bravo issued case management or interlocutory Order No. 54 (GVA/2019) and Order No. 55 (GVA/2019) in Geneva on 16 July 2019 and 17 July 2019 respectively (the Orders). In the Orders, Judge Bravo notified the parties of the reassignment and proposed a course of action. She stated that she was "inclined to undertake a review of the documents and written submissions filed by the parties and to listen to the audio-recordings of the hearing, before making a determination as to whether she is in a position to decide on the matter".[1] She sought the views of the parties on this course of action and allowed them to raise any objections. The Secretary-General did not object. The Appellant objected and appealed the Orders to the Appeals Tribunal.

2. The Appellant says the removal of a sitting judge exceeds the Dispute Tribunal's jurisdiction and is a reviewable and correctable error. The Secretary-General requests the appeal be dismissed.

3. Although there are two separate appeals of the two separate Dispute Tribunal Orders, the issues and submissions on both appeals are the same. Therefore, both appeals are consolidated for the purposes of their fair, just, and expeditious disposition.

[1] Impugned Orders, para. 5.

Statutory Legislative Mandate

4. Article 2(1) of the Statute of the United Nations Appeals Tribunal (the "Statute") sets out the Appeals Tribunal's authority in these appeals, namely the Appeals Tribunal is, *inter alia*, competent to hear and pass judgment on an appeal "against a judgement by the Dispute Tribunal in which it is asserted that the Dispute Tribunal has … [e]xceeded its jurisdiction or competence".

Issues

4. The issues in the appeals are:

i) Whether the appeals of interlocutory orders are receivable by the Appeals Tribunal on the basis that the Dispute Tribunal clearly exceeded its jurisdiction in issuing the Orders; and

ii) If the appeals are receivable, whether the reassignment to Judge Bravo should be rescinded and Judge Downing should be reinstated.

Facts and Procedure

Appointment of ad litem judges

5. In 2008, the General Assembly decided to appoint *ad litem* judges to the Dispute Tribunal as a transitional measure to the current internal justice system from the previous system and as a method to clear a growing backlog.

6. Following a vacancy in one of these positions, the General Assembly appointed Judge Downing as an *ad litem* judge of the Dispute Tribunal for a term of office beginning 1 January 2015 and ending on 31 December 2015. Subsequently, the General Assembly extended Judge Downing's term of office as an *ad litem* judge of the Dispute Tribunal to 31 December 2018.

7. On 22 December 2018, the General Assembly adopted Resolution 73/276 (the "Resolution") in which it approved the addition of four half-time judges to the Dispute Tribunal "in lieu of" the *ad litem* judges, and amended the UNDT Statute accordingly. In the Resolution, the General Assembly also decided "to extend the positions of the two ad litem judges in Geneva and Nairobi and the current incumbent judges," namely Judge Downing and Judge Izuako,

"*pending the nomination of candidates by the Internal Justice Council and the appointment of the aforementioned four half-time judges by the General Assembly, which should take place no later than 31 December 2019*".[2]

8. On 10 July 2019, in Decision 73/408C, the General Assembly appointed the four half-time judges and set out the entire composition of the Dispute Tribunal as of 10 July 2019 naming the three full time judges and the six half-time judges.

The Appellant's first outstanding application before the Dispute Tribunal (UNAT Case No. 2019-1301 -- Case No. UNDT/GVA/2018/099)

9. By application filed on 11 September 2018, the Appellant contested the procedure by which her request for protection from retaliation had been processed, the failure to protect her from retaliation and the failure to follow up on the Ethics Office's recommendations subsequent to her request for protection from retaliation.

10. Judge Downing heard the application and witnesses on 3 and 4 June 2019, and upon closing of the evidence and the parties' final submissions, the case entered its deliberations stage.

The Appellant's second outstanding application before the Dispute Tribunal (UNAT Case No. 2019-1302 -- Case No. UNDT/GVA/2017/052)

11. By application filed on 17 July 2017, the Appellant contested the "ongoing workplace harassment based on protected activity for reporting and objecting to wrongdoing by management", including the decision to conclude an investigation of harassment only with managerial actions; and the "violation of staff member privacy rights and defamation of character", including the related decision to state that her claims had been found unsubstantiated in a press release.

[2] General Assembly resolution 73/276, para. 37 (emphasis added).

12. Judge Downing heard this application and witnesses on 11 and 12 June 2019, and upon closing of the evidence and the parties' final submissions, the case entered its deliberations stage.

Reassignment of cases to Judge Bravo and the Orders

13. On 12 July 2019, the Dispute Tribunal reassigned both cases to Judge Bravo, a full-time judge of the Dispute Tribunal in Geneva. On 16 July and 17 July 2019, respectively, Judge Bravo issued the impugned Orders, in which she sought the parties' views on the reassignment and a response to her reviewing the documents and written submissions and listening to the audio-recordings of the hearing, before making a determination as to whether she would be in a position to decide the matters as they stood. She ordered the parties to raise any objection they might have by 2 August 2019.

14. On 29 July 2019, the Secretary-General advised that he had no objections. On 30 July 2019, the Appellant filed her submissions in response to both Orders, claiming that Judge Downing's removal from her cases was unlawful. She requested that the Secretary-General inform the Dispute Tribunal regarding the circumstances of the decision to end the mandate of *ad litem* judges prior to the completion of their cases, note what information had been provided to the Advisory Committee on Administrative and Budgetary Questions (ACABQ) and the General Assembly regarding the intention to separate *ad litem* judges immediately on appointment of new half-time judges, and indicate what enquiries had been made to the ACABQ and the General Assembly regarding their intention for the mandates of the *ad litem* judges on appointment of the new half-time judges. She also requested that the Secretary-General indicate what extensions had been made to the appointment of *ad litem* judges following Decision 73/408C and what notice had been provided to them of the ending of their mandate. The Appellant claimed that the interests of justice, judicial economy, judicial independence and her right to a fair trial required that a mechanism be found whereby judgment in her cases be handed down by the Judge who had originally been assigned. Should the Dispute Tribunal not accept her submissions in this regard, she submitted that she would have no objection to Judge Bravo listening to the audio-recordings and reading the evidence and arguments already filed.

15. That same day, the Appellant also filed her interlocutory appeals to the Appeals Tribunal. The Secretary-General answered on 4 September 2019.

Submissions

Appellant's Submissions

16. The Appellant submits that Judge Downing was seized of these matters and that he was "removed", apparently without notice, two months prior to the expiry of the deadline for handing down judgment.

17. She accepts that the general rule is that interlocutory orders of the Dispute Tribunal (such as the subject Orders) are not appealable to the Appeals Tribunal except when the Dispute Tribunal has exceeded its jurisdiction. Here, she says the Dispute Tribunal acquiesced to the "removal" by the Secretary-General of a sitting judge, fully seized of the case, after closing submissions and prior to rendering the judgment and as such, exceeded its jurisdiction. Also, the matter on appeal is not a matter that could be properly addressed in an appeal of a final judgment and a final judgment in these cases would not render moot the issues raised in this appeal. The appeals are, therefore, receivable.

18. She also argues that the "removal" of Judge Downing from her cases after closing submissions and prior to rendering a judgment runs contrary to the definition of an *ad litem* judge. For example, in the context of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Court of Justice, an *ad litem* judge is an *ad hoc* judge appointed to participate only in a particular case. There, the ICTY has held it "obvious" that the removal of a sitting judge due to the expiry of term would be contrary to the fundamental right of a fair trial. The Appellant says that the Security Council and the General Assembly have both consistently approved the extension of the term of *ad litem* judges until such time as judgment was rendered in cases of which they were seized.

19. Further, the Appellant submits that the decision to remove Judge Downing does also not accord with Resolution 73/276 as the Resolution did not end Judge Downing's mandate effective 10 July 2019. Rather, his extension was "pending" the appointment of half-time judges which was to occur no later than 31 December 2019. The Resolution does not indicate that the mandate of the *ad litem* judge would lapse upon such appointment. The ACABQ recommendation, upon which the Resolution was based, explicitly calls for an extension to 31 December 2019.

20. The Appellant says that the Secretary-General chose to interpret the word "pending" in Resolution 73/276 as meaning "only until". The Secretary-General decided to interpret the Resolution and remove the judge fully seized of Ms. Reilly's case without notice. It seems unlikely that this was the legislative intent of the General Assembly. The Secretary-General's decision causes duplication of work.

21. Finally, the Appellant says that the Secretary-General, who is a party to the cases, removing a judge fully seized of the matter after closing submissions and prior to the issuance of a judgment is contrary to the principle of judicial independence. In general, the irremovability of judges by the executive must be considered as a corollary of their independence and direct and indirect influence by the executive will impact on the fairness of proceedings, whatever the motive. It is not relevant what motivated the Secretary-General's removal of Judge Downing. Ms. Reilly need not show that the removal was intended to impact her cases or that it will. The principle of judicial independence means the situation operates like a perceived conflict of interest. The removal of the judge by the Secretary-General, who is a party to the case, is sufficient to impinge on the independence of the Tribunal and has a fatal impact on Ms. Reilly's right to a fair trial and access to justice.

22. In summary, the Appellant submits that the removal of the sitting judge is *ultra vires* and represents an excess of jurisdiction. It is a reviewable and a correctable error in the treatment of Ms. Reilly's cases and one whose immediate correction is required to avoid the fatal undermining of her right to a fair trial. Ms. Reilly requests that the Appeals Tribunal rescind the appealed Orders and remand the matter to the Judge fully seized of the matters for judgment.

The Secretary-General's Answers

23. The Secretary-General as Respondent submits that Ms. Reilly's appeals are not receivable for three reasons. First, the Appeals Tribunal has consistently held that an appeal of an interlocutory decision is only receivable in cases where the Dispute Tribunal has clearly exceeded its jurisdiction or competence. The Dispute Tribunal enjoys wide powers of appreciation in all matters relating to case management and the Appeals Tribunal 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 dispensation of justice. The Respondent says the contested Orders are case management orders. Thus, pursuant to the

Appeals Tribunal's jurisprudence, the nature of the contested Orders necessitates the Appeals Tribunal's deference to it.

24. Second, the Respondent says the premise of Ms. Reilly's allegations that the Dispute Tribunal exceeded its jurisdiction is fundamentally flawed. Contrary to her allegations, the Secretary-General did not remove Judge Downing from her cases. Rather, Judge Downing's term of office as an *ad litem* judge of the Dispute Tribunal ended on 10 July 2019. Further, Judge Downing's term of office was determined by the General Assembly, not the Secretary-General. The General Assembly initially appointed Judge Downing as an *ad litem* judge of the Dispute Tribunal for a one-year term of office beginning on 1 January 2015. Subsequently, the General Assembly extended Judge Downing's term of office to 31 December 2018. In Resolution 73/276, the General Assembly extended the term of office of Judge Downing "pending" its appointment of four new half-time judges of the Dispute Tribunal. On 10 July 2019, the General Assembly appointed four new half-time judges to the UNDT and thereby ended the term of office of Judge Downing. The provisional text of General Assembly Decision 73/408C confirms that as of 10 July 2019 the composition of the Dispute Tribunal consists of three full-time judges and six half-time judges and Judge Downing is not one of them.

25. Third, the Appeals Tribunal has held that decisions by the General Assembly are not subject to challenge in the internal justice system. Accordingly, the General Assembly's decisions as to the term of office of Judge Downing fall outside the jurisdiction of the Appeals Tribunal.

26. In light of the foregoing, the Respondent says the appeals are not receivable as Ms. Reilly has failed to demonstrate that the Dispute Tribunal clearly exceeded its jurisdiction or competence in the contested Orders. Therefore, the appeals should be dismissed.

Considerations

Is an interlocutory order of the Dispute Tribunal receivable before the Appeals Tribunal?

27. The impugned Orders are case management or interlocutory orders. Article 2(1) of the Statute provides that the Appeals Tribunal can hear an appeal from a "judgment" rendered by the Dispute Tribunal. It does not clarify whether the Appeals Tribunal may only hear an appeal from a final judgment of the Dispute Tribunal or whether an interlocutory or interim decision made during the course of the Dispute Tribunal's proceedings may also be considered a judgment subject to appeal.

28. However, the Appeals Tribunal has previously held that appeals against most interlocutory decisions will not be receivable, in particular, decisions on matters of evidence, procedure, and trial conduct. An interlocutory appeal is only receivable in cases where the Dispute Tribunal has *clearly* exceeded its jurisdiction or competence.[3]

29. Whether an interlocutory appeal will be receivable depends on the subject-matter and consequences of the impugned decision and whether the impugned decision goes directly to the merits of the case.[4] As established in *Bertucci*, the appellant has the onus of proving that the Dispute Tribunal has clearly exceeded its jurisdiction or competence.

Did the Dispute Tribunal clearly exceed its jurisdiction in reassigning the cases?

30. The Appellant has the onus of proving the Dispute Tribunal "clearly" exceeded its jurisdiction or competence when it reassigned the cases in question. We find this burden has not been met.

31. First, the reassignment does not go directly to the merits of the applications, namely whistle blower protection. The Dispute Tribunal's decisions on assignment and reassignment of judges are matters regarding its case management and the fair and efficient functioning of the tribunal's processes. These matters are within the jurisdiction of the Dispute Tribunal.

32. Second, the Appellant says the Dispute Tribunal "removed" Judge Downing and "replaced" him and the question is one of judicial independence. However, we find based on the statutory interpretation of the Resolution that there has been no "removal" or "replacement". Reading Resolution 73/276 and Decision 73/408C together, Judge Downing's term expired upon the appointment of the half time judges to the Dispute Tribunal

33. In interpreting a legislative provision such as a resolution of the General Assembly, the principle should be that the words of a legislative provision are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the legislation, the

[3] Emphasis added. See *Villamoran v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062; *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; and *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.
[4] *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-060.

object of the legislation, and the intention of the legislature. The General Assembly is the legislative branch of the United Nations and its resolutions constitute legislation.

34. The scheme of the legislative provisions in question was set out initially in Resolution 63/253 (24 December 2008), when the General Assembly outlined "Transitional Measures" for the transition from the previous internal justice system to the current one with the Dispute Tribunal. In paragraphs 35 to 51, it directed the Secretary-General to take measures necessary to reduce an existing backlog and to ensure that the internal justice system continue to function until the completion of the transition. This included its decision, in paragraph 48, that three *ad litem* judges be appointed to the Dispute Tribunal.

35. The object of the legislative provisions and the intent of the General Assembly are reiterated in Resolution 73/276 (22 December 2018). In this Resolution, the General Assembly approved the "addition of four half-time judges *in lieu* of the three ad litem judges to the Dispute Tribunal, to be deployed as required by caseload and any absences affecting the work of the Tribunal".[5] In addition, the General Assembly decided "to extend the positions of the two ad litem judges in Geneva and Nairobi and the current incumbent judges [including Judge Downing], *pending* the nomination of candidates by the Internal Justice Council and the appointment of the aforementioned four half-time judges by the General Assembly, which should take place no later than 31 December 2019".[6]

36. In Decision 73/408C (10 July 2019), the General Assembly then appointed the four half-time judges. The appointment of the *ad litem* judges was a transitional measure until the half-time judges were appointed. By operation of this Decision and the Resolution, the term of the *ad litem* judges expired when the half-time judges were appointed.

37. This interpretation is entirely within the ordinary and grammatical reading of the Resolution and Decision. Judge Downing's term was only extended "pending" or "while waiting" (see Merriam Webster's definition of "pending") the appointment of the four half-time judges which was to occur "no later than 31 December 2019". This interpretation is also not an unreasonable one and accords with the intent of the legislative branch and the context and object of the legislative provisions. Once the half-time judges were appointed, the term of the *ad litem* judges expired. This is confirmed by Article 4(1) of the Dispute Tribunal Statute, which states

[5] General Assembly resolution 73/276, para. 32 (emphasis added).
[6] *Ibid.*, para. 37 (emphasis added).

that the Dispute Tribunal "shall be composed of three full-time judges and six half-time judges" and by Decision 73/408C, which set out the full composition of the Dispute Tribunal. There is no mention of *ad litem* judges and their mandate in that Resolution or the Dispute Tribunal Statute.

38. The Appellant says that Article 4(5) of the Dispute Tribunal Statute contemplates a sitting judge and their replacement serving concurrently. This provision does not apply to the present case. Article 4(5) is applicable in situations where a judge resigns before the expiry of their term or falls sick, and a new judge is appointed to replace them. The provision allows the new judge to serve the remainder of the resigning judge's term. It does not apply where the judge's term has already expired.

39. The Appellant references the Statute of the International Court of Justice to support the position that Judge Downing, despite being an *ad litem* judge, is seized of her matters. The Appellant also argues the Resolutions in question are silent on the timing of the end of Judge Downing's mandate. Unlike the Statute of the International Court of Justice, there is no provision in the Dispute Tribunal Statute to have judges be seized of matters beyond the expiry of their term. The Dispute Tribunal Statute is silent on the term and mandate of *ad litem* judges and is silent on judges remaining to be seized. As with all administrative tribunals, the Dispute Tribunal is a creature of its Statute and does not have jurisdiction other than that provided by the General Assembly. The General Assembly reaffirmed this in paragraph 5 of Resolution 67/241 and paragraph 28 of Resolution 63/253 when it held that the Dispute Tribunal and Appeals Tribunal "shall not have any powers beyond those conferred under their respective statutes".

40. The Appellant says that *ad litem* judges are *ad hoc* judges and refers to the *ad hoc* regime used in the ICTY that allows for *ad litem* judges to remain seized. The *ad hoc* regime used in the ICTY does not apply in these circumstances. Unlike the ICTY, the General Assembly and the Dispute Tribunal Statute did not confer the Dispute Tribunal with authority to extend the mandate of the *ad litem* judges or to give them the authority to remain seized of matters beyond the expiry of their terms.

41. As Judge Downing's term had expired, it is reasonable and procedurally fair for Judge Bravo to seek the parties' submissions on a proposed course of action, namely deciding the appeal based on the record if she determined it was appropriate. This would be the course of action in the event of the death, impeachment, or resignation of a judge, where parties are

generally given the option of rehearing a case or to have the new judge review and issue a decision on the record.

42. The consequence of the course of action proposed in the Orders is not, without more, an impingement of judicial independence or the parties' right to a fair trial. Particularly, where, as here, the course of action has only been proposed and not yet decided on.

43. Consequently, we find that Judge Downing's term as an *ad litem* judge expired by virtue of the appointment of the half-time judges and the operation of the Resolution, and the Dispute Tribunal has no jurisdiction to extend the term of the *ad litem* judges. As a result, we do not find that the Dispute Tribunal *clearly* exceeded its jurisdiction.

44. The appeals are not receivable.

Should the reassignment be rescinded and Judge Downing reinstated?

45. Having found the appeals are not receivable, we make no determination on the Appellant's submissions on the reinstatement of Judge Downing.

46. We note that it is unlikely that the Appeals Tribunal has the authority to order reinstatement of a Dispute Tribunal judge as the authority to appoint, reappoint and extend terms of judges within the internal justice system lies with the General Assembly. Article 9 of our Statute provides that the Appeals Tribunal has the authority to order rescission of the contested administrative decision or specific performance, and/or compensation for harm supported by evidence. There is no authority given to the Appeals Tribunal to order the Dispute Tribunal to reassign or reinstate judges.

Judgment

47. The appeals are dismissed and Dispute Tribunal Order No. 54 (GVA/2019) and Order No. 55 (GVA/2019) are hereby affirmed.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Sandhu, Presiding	Judge Knierim	Judge Murphy

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar