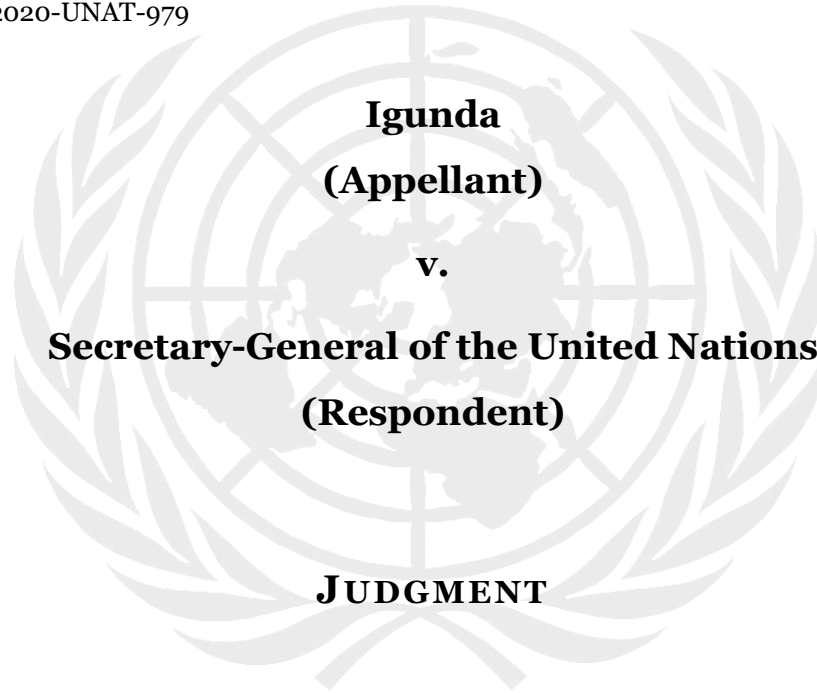




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-979



Before:	Judge Kanwaldeep Sandhu, Presiding Judge Graeme Colgan Judge Dimitrios Raikos
Case No.:	2019-1277
Date:	27 March 2020
Registrar:	Weicheng Lin

Counsel for Mr. Igunda:	Self-represented
Counsel for Secretary-General:	Phyllis Hwang

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Mr. Igunda Mukulutage Sadok¹ was a Supply Assistant with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) on a fixed-term appointment. As a result of retrenchment, he was notified of the decision not to renew his fixed-term appointment beyond its expiration. Prior to expiry of the appointment, he filed an application for suspension of action with the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi to suspend the decision. Per Order No. 079 (NBI/2019), the UNDT declined to suspend the administrative decision on grounds that the impugned administrative decision was not *prima facie* (“on its face”) unlawful as required by Article 2(2) of the UNDT’s Statute.

2. Mr. Igunda appeals the UNDT’s Order before the United Nations Appeals Tribunal (Appeals Tribunal) and largely reiterates arguments on the merits of his non-renewal. The Respondent requests the appeal be dismissed as not receivable.

3. Article 2(2) of the UNDT’s Statute provides that the Dispute Tribunal can determine an application 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. It also states that the Dispute Tribunal’s decision on this application is not subject to appeal.

4. In addition, Article 10(2) of the Dispute Tribunal Statute gives the Dispute Tribunal discretion to

order [at any time of the proceedings] an interim measure, *which is without appeal*, to provide temporary relief to either party, where the contested administrative decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.²

¹ The Appellant’s name appears in the appeal brief as Igunda Mukulutage Sadok. The Appeals Tribunal refers to the Appellant as “Mr. Igunda” as the impugned Order by the UNDT lists the case as “*Igunda v. Secretary-General of the United Nations*”.

² Emphasis added.

5. Further, Article 13 of the UNDT Rules of Procedure (Suspension of action during a management evaluation) provides, in part:

1. The Dispute Tribunal shall order a suspension of action 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.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

6. The Appeals Tribunal has held that an appeal of the Dispute Tribunal's decisions on these applications under Articles 2(2) and 10(2) of the UNDT Statute can only be receivable if the Dispute Tribunal, in the course of making the determination, has clearly exceeded its jurisdiction.³

7. We find the appeal is not receivable and the Dispute Tribunal did not exceed its jurisdiction. We therefore dismiss the appeal for reasons set out below.

Issue

8. The issue in this appeal is whether the Dispute Tribunal clearly exceeded its jurisdiction in its decision to refuse the Appellant's application to suspend the implementation of the decision to not renew his fixed-term appointment. If not, as indicated in Article 2(2) of the UNDT Statute, the Dispute Tribunal's decision is not subject to appeal, and the appeal is not receivable.

9. As a preliminary issue, the Appellant requested an oral hearing before the Appeals Tribunal to "make the verification and comparative of the [e-PAS] of [the] other supply staff [...] and check the matrix" and to "check with the other staff of the section who have followed the human resources conversation that [he] will be affected by the [Comparative Review Process (CRP)] as [he] was under investigation in the past years". We decline this request.

³ *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT 330.

10. We find that an oral hearing would not assist in the “expeditious and fair disposal of the case” in accordance with Article 18(1) of the Appeals Tribunal’s Rules of Procedure. We are not reviewing the impugned decision on its merits or reviewing the evaluation matrix or “E-pass scores” that led to the decision not to renew the Appellant’s appointment. Rather, the issue is whether the Dispute Tribunal clearly exceeded its jurisdiction in refusing the Appellant’s application to suspend the implementation of a contested decision and in finding that the impugned decision was not *prima facie* unlawful as required by Article 2(2) of the UNDT Statute.

Facts and Procedure

11. Mr. Igunda, a former Supply Assistant with MONUSCO, held a fixed-term appointment at the GL-3 level. On 29 May 2019, MONUSCO’s Chief Human Resources Officer informed Mr. Igunda by letter of the administrative decision not to renew his fixed-term appointment upon its expiration set for 30 June 2019 because his post had been identified for retrenchment in a previous CRP.

12. On 17 June 2019, Mr. Igunda filed an application for suspension of action before the UNDT and requested suspension of this decision. He argued that the CRP was conducted arbitrarily and the decision to retrench him had been made prior to the CRP on account of allegations of misconduct that had been made against him in 2011. He also argued that due to his experience and performance evaluations he should have scored the highest in the CRP.

13. On 21 June 2019 the UNDT issued Order No. 079 (NBI/2019) titled, Order on Application for Suspension of Action Pending Management Evaluation (the Order) and dismissed Mr. Igunda’s application on grounds that the decision to retrench Mr. Igunda was not *prima facie* unlawful. In reaching this conclusion, the UNDT found that the CRP matrix reflected that the Panel had not deducted points from Mr. Igunda for disciplinary measures. Rather, Mr. Igunda had scored the lowest among his group of three other supply assistants due to his performance evaluation reports for 2016-2017, which noted that he had required development in two of the core values. Mr. Igunda had agreed to this evaluation. This lowered Mr. Igunda’s score relative to the others. Finding that his application failed on the *prima facie* unlawfulness prong of the test under Article 2(2) of the UNDT’s Statute, the UNDT did not examine the remaining prongs of the test (particular urgency and irreparable harm).

14. On 25 June 2019, Mr. Igunda filed an appeal against the Order before the Appeals Tribunal, and on 26 July 2019 the Secretary-General filed his answer.

15. On 5 August 2019, Mr. Igunda filed a motion for leave to file additional pleadings. On 8 August 2019, the Secretary-General filed his response to Mr. Igunda's motion requesting its dismissal as the letter from the Management Evaluation Unit (MEU) that Mr. Igunda sought to include had already been attached in his application before the UNDT and therefore had already formed part of the appeals record, and was, nonetheless, not relevant.

16. This Tribunal denied Mr. Igunda's motion by way of Order No. 356 (2019), dated 24 October 2019.

Submissions

Mr. Igunda's Appeal

17. Mr. Igunda requests this Tribunal to find that the "UNDT has been influenced by the respondent in the Judgment due to the other order", which this Tribunal believes is reference to the UNDT's Order on suspension of action issued in 2011. Mr. Igunda argues that the UNDT erred in its findings related to the CRP and the scores related to his performance. Mr. Igunda, however, makes no submission on whether the Dispute Tribunal exceeded its jurisdiction or whether his appeal against the Dispute Tribunal's decision is receivable.

The Secretary-General's Answer

18. The Secretary-General requests the Appeals Tribunal to dismiss the appeal as not receivable and affirm the UNDT's Order. Article 2(2) of the UNDT's Statute provides that the Dispute Tribunal's decision on an application for suspension of action shall not be subject to appeal. Furthermore, the Appeals Tribunal's jurisprudence has affirmed that interlocutory appeals may only be received in cases where the UNDT has clearly exceeded its jurisdiction or competence.⁴ The Appeals Tribunal has only received appeals against, and overturned, orders for suspension of action in extremely limited circumstances where the UNDT had exceeded its jurisdiction by suspending a contested decision beyond the completion of the management evaluation or until the case was decided on the merits. In the instant case, Mr. Igunda has not alleged that the UNDT exceeded the scope of its authority to suspend the contested decision.

⁴ *Villamorán v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160, para. 36.

Rather, Mr. Igunda argues the UNDT erred in its finding on lawfulness, namely the CRP and the calculation of scores related to his performance, which in essence is a challenge to the UNDT's determination of whether the criteria for ordering a suspension of action were satisfied. Lastly, the Secretary-General argues that even if the UNDT had erred, this does not constitute an excess of jurisdiction that would permit Mr. Igunda to bypass the appeals process under Article 2(2) of the UNDT's Statute.

Considerations

18. The language of Article 2(2) of the UNDT Statute is clear that applications under that section are not subject to appeal. However, the Appeals Tribunal, in prior cases, has held consistently that it has the authority to judicially review the jurisdiction and competence of the Dispute Tribunal in making determinations under Article 2(2) and 10(2) of the UNDT Statute. Therefore, appeals from the Dispute Tribunal on suspension of action decisions as an interlocutory decision will be receivable before the Appeals Tribunal only if the Dispute Tribunal, in adjudicating such applications, clearly exceeded its competence or jurisdiction.⁵

19. Here, the Appellant does not allege that the Dispute Tribunal exceeded its jurisdiction or competence in refusing the suspension application, nor can his appeal be so interpreted. Rather, the Appellant alleges errors in the scoring of the CRP and bias (by the Administration) in that process and requests the Appeals Tribunal to review whether the retrenchment of his position was justified. As indicated above, the issue before us is not whether the scoring of the CRP was correct nor whether the retrenchment decision was justified nor even whether the Dispute Tribunal committed an error of law or fact relating to the application. Rather, the issue before us can only be whether the Dispute Tribunal in refusing the suspension application clearly exceeded its jurisdiction or competence.

20. As stated by the Appeals Tribunal in *Wamalala*:⁶

[...] the UNDT enjoys wide powers of discretion in all matters relating to case management and that it [UNAT] must not interfere lightly in the exercise of [its] jurisdictional powers. [...] 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

⁵ See *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-330; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-121.

⁶ *Wamalala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300, para. 17.

[...] 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.

21. Here, the Dispute Tribunal reviewed the requirements in Article 2(2) of the UNDT Statute and considered whether the impugned decision appeared to be *prima facie* unlawful. The Dispute Tribunal considered the parties' evidence and submissions on the CRP criteria and its application, and the motive of the impugned decision. It held that there did not need to be a "definitive" finding that the decision was unlawful. We find this was entirely within the Dispute Tribunal's competence and jurisdiction.

22. Therefore, regardless of whether the Dispute Tribunal may have committed an error of law, fact or procedure, Article 2(2) of the Dispute Tribunal Statute precludes an appeal to the Appeals Tribunal as long as the Dispute Tribunal acted within its jurisdiction or competence which it did here.

23. As a result, we find the Appellant's appeal is not receivable.

Judgment

24. The appeal is dismissed and Order No. 079 (NBI/2019) is hereby affirmed.

Original and Authoritative Version: English

Dated this 27th day of March 2020.

(Signed)

Judge Sandhu, Presiding
Vancouver, Canada

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 19th day of June 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar