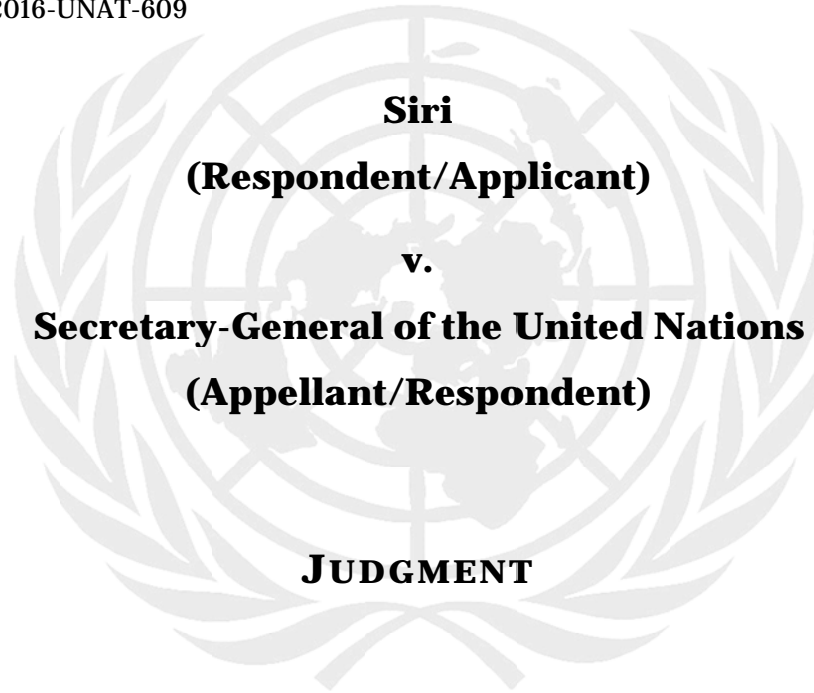




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-609



Siri
(Respondent/Applicant)
v.
Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Rosalyn Chapman
Judge Mary Faherty

Case No.: 2015-864

Date: 22 January 2016

Registrar: Weicheng Lin

Counsel for Mr. Siri: Alexandre Tavadian/Nicole Washienko, OSLA

Counsel for Secretary-General: Nathalie Defrasne

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Order No. 306 (NBI/2015) Corr. 1, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 30 September 2015. The Secretary-General filed his appeal on 23 October 2015, and Mr. Guy Siri filed his perfected answer on 1 December 2015.

Facts and Procedure

2. On 30 November 1989, Mr. Siri was appointed to the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). From 1 February 2007 to 11 August 2008, he served as Senior Humanitarian Affairs Officer at the D-1 level on a reimbursable loan from UNRWA to the United Nations Assistance Mission for Iraq (UNAMI), and from 12 August 2008 to 11 November 2009, he served as D-1 Chief Mission Support to the United Nations Mission in the Central African Republic and Chad (MINURCAT), also on a reimbursable loan from UNRWA.

3. Mr. Siri separated from UNRWA effective 11 November 2009, and on 12 December 2009, he joined the United Nations Secretariat as Director of Mission Support (DMS) at the D-2 level. He currently serves as D-2 Director of Mission Support with the United Nations Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).

4. In February 2015, Mr. Siri was informed by the Director of Field Personnel Division, Department of Field Support (FDP/DFS) that based on the review of the record and in accordance with Staff Regulation 9.2, he could not be retained in active service beyond 30 September 2015, when he would reach the age of 60. On 17 March 2015, Mr. Siri signed a letter of appointment renewing his appointment until 30 September 2015.

5. On 4 August 2015, the Administration commenced a recruitment process in relation to Mr. Siri's post.

6. On 13 August 2015, Mr. Siri filed a management evaluation request regarding the separation decision, and on 24 September 2015, he filed a management evaluation request regarding the recruitment decision.

7. By memorandum dated 25 September 2015, the Management Evaluation Unit (MEU) informed Mr. Siri that it had decided to uphold both contested decisions.

8. On 28 September 2015, Mr. Siri filed with the UNDT an application for suspension of action together with a substantive application on the merits. By Order No. 306 (NBI/2015) dated 30 September 2015, the UNDT granted Mr. Siri's request and ordered the suspension of the non-renewal and the recruitment decisions until the determination of the merits of the case.

9. On 4 December 2015, Judge Inés Weinberg de Roca, Presiding Judge in the case of *Siri v. Secretary-General of the United Nations*, issued Order No. 245 (2015), granting the Secretary-General's motion to hear his appeal on an expedited basis.

10. By Order No. 246 (2015), the President of the Appeals Tribunal rejected Mr. Siri's motion seeking to recuse Judge Weinberg.

Submissions

The Secretary-General's Appeal

11. The interlocutory appeal is receivable. The Appeals Tribunal has expressly allowed appeals against orders on interim relief where the UNDT exceeded its jurisdiction or competence.

12. The Appeals Tribunal has consistently held that matters regarding the non-renewal of appointment constitute a case of appointment, promotion or termination and therefore fall within the exception set out in Article 10(2) of the UNDT Statute. The UNDT exceeded its jurisdiction by ordering the suspension of the non-renewal decision and the recruitment decision.

13. In the present case, Mr. Siri's mandatory age of separation was determined by the date he entered the service of the Organization – not the date he transferred from UNRWA to the Secretariat. As the determination of the retirement age implied a limited renewal of his appointment to match the date of his mandatory separation due to age, the matter necessarily related to an appointment. As a consequence, the UNDT was not competent to suspend the non-renewal decision. The recruitment decision is clearly a decision on a matter of appointment that likewise fell outside the scope of competence of the UNDT.

14. Furthermore, the legal framework and the resolutions of the General Assembly regarding mandatory age of separation and the replacement of the said staff members demonstrate that non-renewal and recruitment decisions concern matters of appointment. The General Assembly has consistently recognized the relationship between human resources planning and programme and budgetary planning processes. Interpreting Article 10(2) of the UNDT Statute as precluding the suspension of a decision concerning an appointment up to the date of a staff member's mandatory age of separation and the consequent recruitment process is fully consistent with the General Assembly's object and purpose in giving such role to the Secretary-General and the Administration.

15. The Secretary-General requests that the Appeals Tribunal grant the appeal and annul the Order in its entirety.

Mr. Siri's Answer

16. The UNDT did not exceed its competence or jurisdiction in suspending "the decision to compel [Mr. Siri] to retire on 30 September 2015 ... before the date of his mandatory retirement". Contrary to the Secretary-General's contention, the decision to compel a staff member to retire before the date of his mandatory retirement age is a not case of appointment within the meaning of Article 10(2) of the UNDT Statute.

17. The term "appointment" should not be read too broadly. The fact that the exclusionary clause in Article 10(2) of the UNDT Statute refers not only to "appointment", but also to "promotion" and "termination", supports the proposition that the term "appointment" must be understood in the strict sense of the word. The legislative history as well as the latest jurisprudence of the Appeals Tribunal also support this strict interpretation.

18. The legal framework of the United Nations must be interpreted in a consistent and cohesive manner. Thus, the terms appointment, termination and retirement must have the same meaning and scope irrespective of the statutory instrument they are found in. To determine whether retirement is a "case of appointment or termination", one must examine the way it is used in the Staff Rules. Rules 9.5 and 9.6 indicate that retirement and separation as a result from retirement shall not be regarded as "termination". If retirement does not constitute termination, *a fortiori*, it does not constitute appointment.

19. Moreover, the recruitment process cannot be a case of appointment within the meaning of Article 10(2) of the UNDT Statute, as there can be no appointment before the end of a recruitment process.

20. The instant case is about the calculation of the correct age of retirement as opposed to non-renewal of appointment, which is intrinsically linked to the disputed question of how and when Mr. Siri became a staff member of the Secretariat. This issue goes directly to the merits of the case and is therefore outside the scope of this appeal. Contrary to the Secretary-General's contention, the UNDT only suspended the decision which resulted in the erroneous calculation of Mr. Siri's retirement age.

21. Although the Appeals Tribunal has ruled that Article 10(2) of the UNDT Statute does not confer the power to suspend the implementation of a decision not to extend an appointment, it has never ruled that the same reasoning applies to a decision to compel a staff member to retire before the normal age of retirement.

22. Mr. Siri asks that the Appeals Tribunal hold an oral hearing on the ground that the appeal "revolves around complex facts and legal and factual issues".

23. Mr. Siri contends that it is more appropriate to consider the issues raised by the Secretary-General during the proceedings on the merits rather than on an appeal of interlocutory order. Mr. Siri asks that the appeal be dismissed.

Considerations

24. Mr. Siri requests an oral hearing, which he believes will aid the Appeals Tribunal in its deliberations. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). Under Article 18(1) of the Rules, a request for an oral hearing may be granted when it would "assist in the expeditious and fair disposal of the case". In the present case, the Appeals Tribunal does not find that an oral hearing would assist it in resolving the issue on appeal. As a result, the request for an oral hearing is denied.

25. The Appeals Tribunal must consider whether under Article 2(1) of its Statute, it is competent to hear the present appeal. Article 2(1) of its Statute, which establishes the competence of the Appeals Tribunal, provides as follows:

The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a Judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

26. As the Appeals Tribunal has consistently stated, the general principle underlying the right of appeal set out in Article 2(1) of the Appeals Tribunal Statute is that only final judgments of the UNDT are appealable. In *Tadonki*, we stated:¹

The UNAT Statute does not clarify whether UNAT may review only a judgment on merits, or whether an interlocutory decision may also be considered a judgment subject to appeal. But one goal of our new system is timely judgments. This Court holds that generally, only appeals against final judgments will be receivable. Otherwise, cases could seldom proceed if either party were dissatisfied with a procedural ruling.

27. In *Bertucci*, the Appeals Tribunal, however, found that 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 the 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.²

28. In the present case, the issue for determination is whether the UNDT, by suspending the non-renewal of Mr. Siri's appointment as well as the decision to conduct a recruitment exercise for his position until the determination of the case on the merits "clearly exceeded its competence or jurisdiction".

29. Article 2(2) of the Statute of the UNDT, laying out the general structure and jurisdiction of the UNDT, grants the power to suspend the implementation of an administrative decision during the pendency of management evaluation.

¹ *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005, para. 18.

² *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-060, para. 18, citing *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062.

30. Article 10(2) of the Statute of the UNDT provides that the UNDT may adopt interim measures at any time of the proceedings, that is to say, once judicial proceedings have been initiated. Among those measures, it provides for the suspension of implementation of administrative decisions and prohibits the adoption of such suspension in cases of appointment, promotion, or termination. These cases are also subject to special treatment under Article 10(5)(a) of the UNDT Statute, which provides for compensation as an alternative to the rescission of administrative decisions.

31. Articles 13 and 14 of the UNDT Rules of Procedure follow the same logic, though with slightly different wording. They must not be read as amending the Statute, because they merely serve as instrument to implement the Statute (see Article 7(1) of the UNDT Statute).

32. In the present case, the issue for determination is whether the non-renewal of Mr. Siri's appointment and the decision to conduct a recruitment exercise in relation to his post concern a case of "appointment, promotion, or termination". If the Appeals Tribunal finds that the contested decisions constitute to a case of "appointment, promotion, or termination", the UNDT will have exceeded its jurisdiction or competence and the appeal will be receivable. On the other hand, if the Appeals Tribunal finds that the contested decisions do not constitute a case of "appointment, promotion, or termination", the UNDT will have acted within its jurisdiction and the appeal would be considered non-receivable.

33. The Appeals Tribunal has previously found that cases of separation following non-renewal constitute a case of appointment and fall under the exclusionary clause of Article 10(2) of the UNDT Statute.³ In these cases, the reversal of the underlying contested decision results in the issuance of a new appointment reflecting "expressly or by reference all the terms and conditions of employment" as provided for in Staff Rule 4.1. Conversely, the rescission of a transfer⁴ or appointment⁵ does not constitute an "appointment" under Article 10(2) of the UNDT Statute and its reversal does not result in a new appointment.

³ *El-Komy v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-324, paras. 3 and 20; *Benchebbak v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-256, paras. 12 and 34.

⁴ *Rantisi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-258, para. 65; *Kaddoura v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-151, paras. 7, 19, and 41.

⁵ *Parker v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-002, paras. 4, 14(d) and 15.

34. As Mr. Siri correctly points out, all matters before the UNDT, in some way, “relate” to appointment, as without an appointment, there is no standing before the Tribunals. However, a matter “related” to an appointment is not the same as a “case of appointment” under Article 10(2) of the UNDT Statute.

35. In the present case, Mr. Siri is not asking for a renewal of his appointment. Rather, he contests the decision to separate him from service based on what he considers to be an erroneous calculation of his retirement age. While necessarily linked to his appointment, his retirement age is a term of his current appointment and, as such, does not constitute “a case of appointment” under Article 10(2) of the UNDT Statute.

36. Finally, the decision to conduct a recruitment exercise for Mr. Siri’s position is a direct consequence of the decision to separate him from service, and as such cannot fall under the narrow definition of “appointment” under Article 10(2) of the UNDT Statute.

37. For the foregoing reasons, the UNDT acted well within its jurisdiction when suspending the contested decisions until the determination of the case on the merits.

Judgment

38. The appeal is not receivable and is dismissed.

Original and Authoritative Version: English

Dated this 22nd day of January 2016 in Buenos Aires, Argentina; Los Angeles, United States; and Dublin, Ireland.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Chapman

(Signed)

Judge Faherty

Entered in the Register on this 26th day of January 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar