



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

Judgment No. 2016-UNAT-641

**Chemingui
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Rosalyn Chapman, Presiding Judge Inés Weinberg de Roca Judge Mary Faherty
Case No.:	2015-850
Date:	24 March 2016
Registrar:	Weicheng Lin

Counsel for Mr. Chemingui: Marisa MacLennan, OSLA

Counsel for Secretary-General: Amy Wood

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Order No. 245 (NBI/2015) issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 28 July 2015, in the case of *Chemingui v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 24 August 2015, and at the same time, he also filed a motion for expedited review of the appeal. On 8 September 2015, Mr. Mohamed Chemingui filed his answer to the appeal and his opposition to the motion for expedited review.

Facts and Procedure

2. Mr. Chemingui is a Senior Economist, Chief of Section, serving at the P-5 level in the Economic Development and Integration Division (EDID) of the Economic and Social Commission for Western Asia (ESCWA).

3. On 5 May 2015, the Director of the Administrative Services Division, ESCWA, advised Mr. Chemingui that he would be laterally reassigned or transferred to the position of Regional Adviser on Trade in EDID, effective 1 June 2015.

4. On 13 May 2015, Mr. Chemingui requested management evaluation of the decision to laterally reassign him. On 20 July 2015, the Management Evaluation Unit (MEU) advised Mr. Chemingui that the decision had been upheld.

5. On 21 July 2015, Mr. Chemingui filed before the UNDT an application challenging the decision to laterally reassign or transfer him and an application for suspension of action. On the same day, the UNDT issued Order No. 240 (NBI/2015) suspending the contested decision until 28 July 2015. On 22 July 2015, the Secretary-General filed his reply to the application for suspension of action, requesting that the UNDT vacate Order No. 240 (NBI/2015).

6. On 28 July 2015, the Dispute Tribunal issued Order No. 245 (NBI/2015) (Order), granting Mr. Chemingui's request for suspension of action, ordering suspension of the decision "pending informal consultation and resolution between the Parties or the determination of the substantive application in the event that mediation fails".¹

7. On 24 August 2015, the Secretary-General filed an interlocutory appeal of Order No. 245 (NBI/2015) and a motion for expedited review of the appeal, and on 8 September 2015, Mr. Chemingui filed his answer and opposition to the motion for expedited review.

8. On 30 October 2015, the Appeals Tribunal issued Order No. 240 (2015), denying the Secretary-General's motion for expedited review, finding "the Secretary-General ha[d] not met his burden to show good cause to grant his motion".²

Submissions

The Secretary-General's Appeal

9. The interlocutory appeal is receivable by the Appeals Tribunal, pursuant to Article 2(1) of the Appeals Tribunal Statute (Statute) as the UNDT exceeded its competence or jurisdiction in issuing the Order.

10. The authority of the UNDT to order interim relief or suspension of action is specifically limited by Article 10(2) of the UNDT Statute, which makes an exception for cases of appointment, promotion or termination. The transfer or reassignment of a staff member is by necessity a form of appointment, as provided for in ST/AI/2010/3 (Staff selection system) and relevant jurisprudence.

11. Interpreting a decision on lateral reassignment as coming within the exception to Article 10(2) for cases of appointment is consistent with the General Assembly's intention in that a lateral reassignment affects the rights of other staff members, as well as the overall functioning of the Organization. If the UNDT were permitted to suspend decisions on reassignment, it would negatively impact the effective and efficient functioning of the Organization, contravening Article 101 of the Charter.

¹ Impugned Order, para. 33.

² *Chemingui v. Secretary-General of the United Nations*, Order No. 240 (2015), para. 7.

12. The Secretary-General requests that the Appeals Tribunal annul the Order.

Mr. Chemingui's Answer

13. The appeal is not receivable in that the UNDT did not exceed its competence or jurisdiction in issuing the Order. Article 10(2) of the UNDT Statute authorizes the Dispute Tribunal to “order an interim measure, which is without appeal”. The Secretary-General does not dispute that the conditions for granting interim relief were met, i.e., *prima facie* unlawfulness, irreparable harm, particular urgency, so that some interim relief was warranted.

14. The Secretary-General's assertion that the Order comes within the exception to Article 10(2) of the UNDT Statute, as it pertains to a case of “appointment, promotion or termination”, is without merit. Exceptions to general rules are to be applied restrictively, rather than expansively. The Appeals Tribunal has previously held that reassignment is not a matter of appointment. Moreover, the legislative history of the UNDT Statute, as well as a proposed amendment, show an intention on the part of the General Assembly not to interpret expansively the term “appointment”. Thus, a case must “clearly” come within the exception for an interlocutory order of interim relief to be appealable.

15. To hold that the Dispute Tribunal could not lawfully afford interim relief or suspension of action to Mr. Chemingui would allow a manifestly unlawful decision to go unchecked and would irreparably harm Mr. Chemingui. Accordingly, the appeal should be dismissed.

Considerations

16. Article 2(1) of the Statute provides, *inter alia*, that “[t]he 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 ... [e]xceeded its jurisdiction or competence”.

17. The Appeals Tribunal has consistently held that the general principle underlying the right of appeal set out in Article 2(1) of the Statute is that only final judgments of the UNDT are appealable, as we stated in *Tadonki*:³

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.

18. However, in *Bertucci*, the Appeals Tribunal found that an interlocutory appeal may be receivable where the UNDT has clearly exceeded its jurisdiction or competence.⁴ This will not be the case in every interlocutory decision by the UNDT – even when the UNDT makes an error of law.⁵

19. Article 10(2) of the Statute of the UNDT provides that the Dispute Tribunal has the authority to grant interim relief, including suspension of action, as follows:

At any time during the proceedings, the Dispute Tribunal may order 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 decision, *except in cases of appointment, promotion or termination*. (Italics added).

20. Articles 13 and 14 of the UNDT Rules of Procedure reiterate this provision, though with slightly different wording. They must not be read as amending the UNDT Statute, however, because they merely serve as instrument to implement the Statute (see Article 7(1) of the UNDT Statute).⁶

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

⁴ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, para. 21, quoting *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; *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.

⁵ *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-060, paras. 18 and 19.

⁶ *Siri v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-609, para. 31.

21. The Order we are reviewing granted Mr. Chemingui's request for suspension of action, finding that he had shown: (i) a *prima facie* case of unlawfulness of the lateral reassignment; (ii) urgency, as the decision was to take effect 1 August 2015; and (iii) irreparable harm, in that the lateral reassignment could have adverse consequences for his career in the Organization. The UNDT suspended the lateral reassignment decision until the parties resolved the dispute or the Dispute Tribunal determined the merits of the claim raised in the substantive application.

22. The sole issue before the Appeals Tribunal is whether the UNDT, by suspending the decision to laterally reassign or transfer Mr. Chemingui until the determination of the case on the merits, "clearly exceeded its competence or jurisdiction". If the administrative decision to laterally reassign Mr. Chemingui is a case of "appointment, promotion, or termination", as the Secretary-General claims, then it comes within the exclusionary clause of Article 10(2) of the UNDT Statute, and we will find that the UNDT exceeded its jurisdiction or competence in issuing the Order; thus, the appeal will be receivable. On the other hand, if we find that the administrative decision does not constitute a case of "appointment, promotion, or termination", we will find that the UNDT acted within its jurisdiction and the appeal will be considered non-receivable.

23. The Secretary-General broadly argues that a lateral reassignment affects other staff members, as well as the efficient operations of the Organization, and as such, it was the intention of the General Assembly in enacting the exclusionary clause of Article 10(2) to include such cases within the appointment exception.

24. We disagree. Although the Appeals Tribunal has not previously determined whether lateral reassignment or transfer decisions come within Article 10(2)'s suspension of action exclusionary clause of "cases of appointment, promotion or termination", we have had the occasion to consider whether such decisions come within Article 10(5)(a)'s alternative compensation in lieu of rescission or specific performance clause pertaining to contested administrative decisions "concern[ing] appointment, promotion and termination". In such cases, the Appeals Tribunal has consistently held that an unlawful lateral reassignment or transfer decision, which is subject to a UNDT order of rescission or specific performance, does not come within the inclusionary clause of Article 10(5)(a) and does not require an order of compensation in lieu of rescission or specific performance.

25. In *Kaddoura*, we held that the UNDT did not err in rescinding the administrative decision to laterally reassign the staff member without ordering compensation in lieu thereof, as requested by the staff member, noting that “compensation in lieu of a specific performance is only required when the administrative decision which is rescinded concerns appointment, promotion, or termination, which is not the case here”.⁷ We reached a similar conclusion in *Rantisi*,⁸ wherein the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) argued that the UNRWA Dispute Tribunal should have awarded compensation in lieu of rescission of a transfer decision; we held that the order granting rescission of the transfer decision did not require compensation in lieu thereof. Finally, the Appeals Tribunal held that the rescission of an administrative decision involving placement between assignments did not require in-lieu compensation as it did not concern the staff member’s appointment, promotion or termination.⁹

26. For these reasons, the Appeals Tribunal determines that the Dispute Tribunal acted within its competence or jurisdiction when it ordered the suspension of the reassignment or transfer decision until the determination of the merits of Mr. Chemingui’s claims. Accordingly, the Secretary-General’s appeal of the Order is not receivable.

Judgment

27. The appeal is not received.

⁷ *Kaddoura v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-151, para. 41.

⁸ *Rantisi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-528, para. 65.

⁹ *Parker v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-002, para. 14(d).

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Faherty

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar