



JUDGE INÉS WEINBERG DE ROCA, Presiding

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it three appeals filed by the Secretary-General of the United Nations against Order No. 129 (2011/NBI), Order No. 136 (NBI/2011), and Order No. 142 (NBI/2011), issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 19 October 2011, 31 October 2011 and 10 November 2011, respectively.

Synopsis

2. All three appeals are receivable, because the UNDT exceeded its jurisdiction or competence in ordering the suspension of the contested decision beyond the date of the completion of management evaluation in a matter concerning an appointment.

3. The Secretary-General seeks guidance on the question of whether an order rendered by the UNDT requires execution in cases where the order is being appealed. Article 8(6) of the Rules of Procedure of the Appeals Tribunal pr

UNDT found the application receivable as the contested decision amounted to a non-renewal rather than a termination. The UNDT accordingly found that the prohibition of the suspension of decisions on appointment, promotion, and termination provided for in Article 10(2) of the UNDT Statute and Article 14 of the UNDT Rules of Procedure did not apply. The UNDT found that the criteria for suspending the contested decision were met and consequently ordered the continued suspension of the contested decision, pending the determination of the case on the merits.

13. The Secretary-General appeals Order No. 129, Order No. 136 and Order No. 142.

Submissions

Secretary-General's Appeals

Order No. 129 (2011/NBI) and Order No. 136 (NBI/2011)

14. The Secretary-General submits that the appeals are receivable.

15. The Secretary-General submits that the UNDT exceeded its jurisdiction or competence by ordering (and confirming in Order No. 136) the suspension of the contested decision beyond the period of management evaluation. The management evaluation was completed on 26 October 2011 and the UNDT exceeded its jurisdiction in ordering (and confirming in Order No. 136) the suspension beyond that date.

16. The Secretary-General requests that the Appeals Tribunal find that there is no obligation to execute an order suspending a contested decision beyond the period of management evaluation, pending an appeal, as the Appeals Tribunal has already confirmed such an order to be unlawful. The Secretary-General submits that in Villamoran,^{2e702 22ming in sidande U(t)ia(}

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22. Mr. Benchebbak argues that the appeals are not receivable. The interim suspension was lawfully ordered in accordance with the Appeals Tribunal's holding in Villamorán.³ The preliminary suspension was not scheduled to extend beyond management evaluation, but to the determination of the Rule 13 motion. It is impossible for the UNDT to foresee when management evaluation would be complete and "[t]he lapse of the operation of the suspension of action, upon management evaluation, was to be understood from the context". With respect to Order No. 136, Mr. Benchebbak submits that the UNDT declined "to wholly dissolve Order No. 129 and confirmed the effect of the Administration's decision upon the [Management Evaluation Unit's] recommendation". (Italics in original) Further, Order No. 136 is not a fresh ruling independent from Order No. 129 and the appeal against it is, therefore, not receivable. The Order is lawful and the UNDT did not exceed its competence.

23. Mr. Benchebbak submits that the Administration is obliged to comply with all UNDT's Orders. A party cannot ignore injunctive relief that it believes to be unlawful.

24. Mr. Benchebbak submits that, regardless of the outcome of the appeal, the Organisation cannot claim that he pay back his salary and entitlements. Such relief is not provided for in Article 9 of the Statute of the Appeals Tribunal.

Order No. 142 (NBI/2011)

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Considerations

28. Article 2 of the UNDT Statute, 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.

29. 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 the implementation of administrative decisions but 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 the administrative decision.

30. Articles 13 and 14 of the UNDT Rules of Procedure follow the same logic, albeit with slightly different wording. They should not be read as amending the Statute, because they are mere instruments to implement the Statute (see Article 7(1) of the UNDT Statute).

31. Articles 2(2) and 10(2) of the UNDT Statute govern the suspension of the implementation of an administrative decision and must be read together. The first concerns the time period pending management evaluation, and the second, the time period of judicial proceedings before the UNDT. It must also be pointed out that, in principle, administrative decisions are executable upon their adoption. Therefore, the suspension of the execution or implementation of an administrative decision constitutes an exception that cannot be extended beyond the limits and prohibitions established by the Statute so that the legislative texts, spirit, and goals underlying them are not ignored or violated.

32. The Appeals Tribunal is of the view that the exclusion of the right to appeal a decision to suspend the execution of an administrative decision constitutes an exception to the general principle of the right to appeal and must, therefore, be narrowly interpreted. As a result, this exception applies only to jurisdictional decisions ordering the suspension of an administrative decision pending management evaluation. The Appeals Tribunal thus considers that no jurisdictional decision, no matter how it is named by the Dispute Tribunal, which, as in the present case, orders the suspension of a contested administrative decision for a period beyond the date on which the management evaluation is completed, can be

considered as falling within the scope of the exception to the right to appeal as outlined in the aforementioned provisions of Article 2(2) of the UNDT Statute, and of Article 13 of its Rules of Procedure.⁴ In the instant case, Order No. 129 suspended the contested decision beyond

executing an order by filing an appeal against it on the basis that the UNDT exceeded its jurisdiction.⁵

38. The UNDT, on the other hand, is expected to follow the clear and consistent jurisprudence of the Appeals Tribunal in Tadonki,⁶ Onana,⁷ and Kasmani.⁸

Judgment

39. The Appeals Tribunal grants the appeals and vacates Order No. 129, Order No. 136, and Order No. 142.

Original and Authoritative Version: English

Dated this 1st day of November 2012 in New York, United States.

(Signed)

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Judge Wnn3(Signed)