
UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Al-Badri

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Mary Faherty, Presiding Judge Sophia Adinyira Judge Luis María Simón
Case No.:	2013-531
Date:	17 October 2014
Registrar:	Weicheng Lin

JUDGE MARY FAHERTY , PRESIDING .

1.

“gradual but sure path back to Iraq” and that all efforts were being made to increase United Nations agencies presence both in Baghdad and in the field offices. ...

... The Country Director wrote to the Deputy Resident Representative (Operations), UNDP Iraq, on 8 March 2010 requesting that the Applicant’s post be advertised with the duty station as Baghdad, Iraq. He explained that this move was

offer and that if she chose to decline she would be separated from UNDP effective 31 December 2010. [The OIC ended the letter by stating: "We hope the present letter addresses the concerns you raised in your letter of 8 August 2010. ... We note that the subject of your email of 8 August to which your letter was attached is "*Appeal for Management Evaluation*". If, as we hope, the present letter addresses your concerns, please kindly withdraw your request for management evaluation in writing so that the case [may] be considered closed from legal viewpoint." (Italics in original)]

[On 15 September 2010, Ms. Al-Badri discussed the status of her request of 8 August 2010 for management evaluation with a Senior Legal Officer, Legal Support Office, BOM. In an email of that date, the Senior Legal Officer wrote "to confirm that ... the current deadline for reply to your request for management evaluation is suspended until further notice, i.e. until such time *you* decide that you want to proceed with the matter again". She went on to state: "Indeed, as discussed, efforts are being made by the Organization to try and address the issues you raised with a view to, if possible, resolving them informally. Should such efforts fail, or should you remain in any way dissatisfied, you will, of course, as I explained to you, be at liberty to resume the process by simply informing Ms. Duncan-Witter, [who] sent you the acknowledgment of receipt on behalf of Ms. Akiko Yuge, Assistant Administrator and Director, BOM, that you wish to proceed with your request. Once you do that, another acknowledgment of receipt will be sent to you, with a timeframe within which you may be expecting a reply from Ms. Yuge. In other words, the suspension of the deadline does not affect your right as a staff member to receive a reply to your request for management evaluation should you wish to proceed with this at any stage in the future."]

[Following receipt of Ms. Al-Badri's email of 17 September 2010 requesting suspension of the deadline to receive a response to her request for management evaluation, on 22 September 2010, Ms. Yuge sent Ms. Al-Badri a letter stating: "I have been informed that, in light of the ongoing efforts made to resolve the issues informally, you have agreed to have the consideration of your request for management evaluation suspended until further notice. Should the issues not be resolved to your satisfaction, you will, of course and at any stage in the future, be at liberty to ask that the formal process be resumed. Should this occur, you will receive a new acknowledgment of receipt from my Office, together with an indication of the date by which you may expect a reply."]

... During a meeting with the Deputy Director/OHR on 23 September 2010, the Applicant requested that her application for the Procurement Analyst post in Baghdad, which she had submitted after the application deadline due to pressing

family/personal matters, be considered. Consequently, she was offered the post on 12 October 2010 and asked to communicate her acceptance by 25 October 2010^[2]

... The Applicant wrote to the Deputy Director/OHR on 20 October 2010 seeking clarification as to whether the Entry on Duty (EOD) date was negotiable in light of the security situation in Iraq. On 25 October 2010, [the Applicant] communicated her initial acceptance of the offer.

[Discussions ensued between Ms. Al-Badi and UNDP regarding her EOD for reporting for duty in Iraq, with Al-Badri preferring the end of March 2011 and the UNDP Iraq insisting on the EOD no later than 1 December 2010.]

... The Applicant declined the offer on 16 November 2010 and on 23 December 2010; she applied for Special Leave Without Pay for a period of one year from 1 January 2011 to 31 December 2011, which was approved by OHR/BOM.

... On 29 March 2011, the Applicant requested that OHR/BOM resume management evaluation of her initial 8 August 2010 request. In a response dated 13 May 2011, the Applicant was informed by the Assistant Administrator and Director/BOM that her 8 August 2010 request for management evaluation was, *inter alia*, time-barred and therefore not receivable.

... [The Applicant filed an application with the UNDT on 7 August 2011] ... to contest: (i) the sudden verbal decision to relocate her post from Amman to Baghdad without any notice and the subsequent abolition of her post in Amman; and (ii) the rejection of her request by the Country Office to postpone her entry on duty (EOD) date for a post in Baghdad to the end of March 2011.

3. In Judgment on Receivability No. UNDT/201 3/103, the Dispute Tribunal found that while Ms. Al-Badri was late in filing her request for management evaluation, "OHR/BOM accepted it without raising the issue of receivability at the outset but rather engaged her on the merits of her claim in a letter dated 25 August 2010. Additionally, by a letter dated 22 September 2010, the Assistant Administrator and Director of BOM confirmed an agreement with the Applicant to suspend her request for management evaluation 'until further notice'."³ It concluded that UNDP "effectively waived the deadline for management evaluation and handed the Applicant the discretionary authority to decide when to litigate her matter by engaging her on the merits of her tardy claims via the letter of 25 August 2010 and by suspending her request for management evaluation via the letter of 22 September 2010 'until further notice' with an undertaking that she could request for

[2] The Deputy Director/OHR here is the same person as the OIC/OHR/BOM, who provided a response to Ms. Al-Badri on 25 August 2010.

³ Impugned Judgment, para. 36.

resumption of the formal process ‘at any stage in the future’, should the issue not be resolved to her satisfaction”.⁴ In the view of the Dispute Tribunal, the UNDP was “estopped from asserting” that Ms. Al-Badri’s challenge of the decision to abolish her post in Amman and to create a new post in Baghdad was time-barred. On the other hand, the Dispute Tribunal

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13. Article 2(1) of the Statute 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)

and *Kasmani*, that an interlocutory appeal is receivable in cases where the UNDT has clearly exceeded its jurisdiction or competence.⁷

In that case we stated further:

As the court of first instance, the UNDT is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and do justice to the parties. The Appeals Tribunal will not interfere lightly with the broad discretion of the UNDT in the management of cases. Further, one of the goals of the new system of administration of justice is rendering timely judgments. Cases before the UNDT could seldom proceed if either party were able to appeal to the Appeals Tribunal if dissatisfied with an interlocutory decision made during the course of the proceedings. Therefore, generally, only appeals against final Judgments are receivable⁸.

16. In *Wasserstrom*, the Appeals Tribunal opined:

As stated in *Bertucci*, 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. The general rule that only appeals against final judgments are receivable does not apply where the UNDT dismisses a case on the grounds that it is not receivable under Article 8 of the UNDT Statute, as the case cannot proceed any further and there is in effect a final judgment.

The receivability of an interlocutory appeal from a decision of the UNDT allowing a case to proceed on the basis that it falls within its competence under the UNDT Statute is a different matter. If the UNDT errs in law in making this decision and the issue can be properly raised later in an appeal against the final judgment on the merits, there is no need to allow an appeal against the interlocutory decision.

In the present case, the Appeals Tribunal sees no reason to depart from the general rule that only appeals against final judgments are receivable. The question of whether the determination made by the Director of the Ethics Office that no retaliation had occurred constitutes an administrative decision goes directly to the merits of the case.

established in this case and the issue cannot be decided before the UNDT has rendered a judgment on the merits of the case⁹

17. It is the case that with regard to matters touching on jurisdictional matters such as whether a staff member has filed a timely request for management evaluation prior to initiating formal litigation, or waiver of time limits for management evaluation, appeals of the Dispute Tribunal judgments and orders on these issues were held by the Appeals Tribunal to be receivable.¹⁰

18. In *Wamalala*, the Appeals Tribunal was satisfied to receive an interlocutory appeal on the basis of its finding that the applicant in that case “[had] not submitted the contested or impugned decision for management evaluation prior to filing an application before the UNDT” and the Appeals Tribunal held that “the Secretary-General has clearly established the lack of jurisdiction of the UNDT”.¹¹

19. Accordingly, in that case the Appeals Tribunal “[made] an exception to the general rule that only appeals against final decisions are receivable. The issue of jurisdiction in this instant case does not go directly to the merits of the case as in *Wasserstrom*. Therefore, there is the need to receive the appeal now rather than wait for the issue to be raised in an appeal against the final Judgment.”¹²

20. It is in the light of our above-cited juri

22. We are not persuaded that the circumstances of the present case permit such adjudication as we find that the alleged lack of jurisdiction or competence on the part of the UNDT, given the particular circumstances of this case and the issue which had to be decided by the Dispute Tribunal, has not been clearly established. Thus, the matter complained of by the Secretary-General in this appeal, while indeed touching upon the competence of the UNDT to adjudicate on Ms. Al-Badri's application, is an argument which is more properly for consideration once a final judgment has been rendered if and when the Secretary-General chooses to appeal. We so find because the issue of jurisdiction or competence in this case goes directly to the merits.

23. Accordingly, we hold that the Secretary-General's appeal is not receivable.

Judgment

24. The appeal is not receivable and is dismissed.

