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APPEALS TRIBUNAL OF THE UNITED NATIONS



Applicant)

United Nations
Secretary-General)



Respondent)

Before

President,
OSLA

Case No.

Date:

Registration No.

Counsel for

Applicant, OSLA

Counsel for

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 20- 7 . 3 D a - 2 . 8 1 9 7

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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

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. 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

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).

