Judgment No. 2021-UNAT-1080

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JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal by Mr. Mathieu Mukeba Wa Mukeba (Appellant), a former staff member serving at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). On 6 November 2018, the Appellant filed an application with the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) challenging the Administration's decision to impose the disciplinary measure of separation from service. On 29 June 2020, the UNDT issued Judgment No. UNDT/2020/103,¹ dismissing the application for want of prosecution. For reasons set out below, we affirm.

Facts and Procedure

2. The Appellant commenced service with the Organization on 1 December 2007. Prior to his separation, he held a fixed-term appointment at the G-3 level, performing the functions of a Driver at the Office of the Director of Mission Support, MONUSCO.

3. On 16 August 2018, the Assistant Secretary-General (ASG) for Human Resource Management imposed upon Appellant the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity. The ASG imposed such measure after establishing by clear and convincing evidence that Appellant had engaged in serious misconduct by misappropriating and taking supplies belonging to the Organization to an undisclosed location, namely 1,050 archive boxes, 50 green permanent markers, 50 red permanent markers, and 10 brown tapes.

4. On 6 November 2018, Appellant filed an application with the Dispute Tribunal in Nairobi, challenging the imposition of the disciplinary measure of separation from service.

5. On 19 July 2019, the case was transferred to the UNDT New York Registry. On 31 January 2020, by way of Order No. 18 (NY/2020), the Dispute Tribunal decided to hold a hearing on the merits and requested the parties to confirm their availability.

¹ Mukeba Wa Mukeba v. Secretary-General of the United Nations, Judgment No. UNDT/2020/103 dated 29 June 2020 (Impugned Judgment).

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granted when it would "assist in the expeditious and fair disposal of the case." The Appeals Tribunal rejects Appellant's request for an oral hearing finding that the matter does not require further clarification.

The Appeal

22. The instant appeal is defective as Appellant has failed to identify any of the five grounds of appeal set out in Article 2(1) of the Statute.!

23. Article 2(1) of the Statute provides that:

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.

24. These provisions are supplemented by Article 8(2) of the Rules, which provides, in part, that "[t]he appeal form shall be accompanied by (...) [a] brief that explains the legal basis of any of the five grounds for appeal set out in article 2.1 of the statute of the Appeals Tribunal that is relied upon".

25. This Tribunal has consistently held that it is the appellant's burden to demonstrate that the Dispute Tribunal erred on a question of law or fact, resulting in a manifestly unreasonable decision. It follows that the appellant must identify the alleged defects in the judgment and state the grounds relied upon in asserting that the judgment is defective.

26. In *llic*,² we stated:

When the Appeals Tribunal hears an appeal, it does not simply re-try the case. The function of the Appeals Tribunal is to determine if the Dispute Tribunal has made errors of fact or law, exceeded ec1(i) -33((d) -321()n (a) 2 D (aw70 Tm / TT3 1 Tf 9U652() -320 (or) -1() -320 (I)-

satisfying the Appeals Tribunal that the judgment rendered by the Dispute Tribunal is defective. It follows that the appellant must identify the alleged defects in the judgment and state the grounds relied upon in asserting that the judgment is defective. It is not sufficient for an appellant to state that he or she disagrees with the outcome of the case or repeat the arguments submitted before the Dispute Tribunal.

27. And in Krioutchkov,³ we accordingly held:

17. According to Article 2 of the Appeals Tribunal's Statute, the competence of this Tribunal is limited to certain issues. For a first instance decision to be vacated or overturned, an appellant must provide proof that the first instance tribunal, in rendering its judgment, exceeded its jurisdiction or competence, failed to exercise jurisdiction vested in it, erred on a question of law, committed an error in procedure such as to affect the decision of the case, or erred on a question of fact, resulting in a manifestly unreasonable decision.

18. It follows that it is not enough for an appellant to disagree with the findings of fact or the conclusions of law made by the trial court. Rather, for an appeal to succeed, an appellant must persuade this Tribunal that the contested decision fulfills the objective criteria of its competence.

28. In his appeal, Appellant neither raises any ground of appeal enumerated in Article 2(1) of the Statute nor does he explain why the Appeals Tribunal should overturn the UNDT Judgment. He only alleges that "he was very surprised when he learned that the Nairobi Registry had transferred his case to the New York Registry" and that he provided a "litany of reasons" as to why he could not communicate with the New York Registry, but the UNDT did not understand him and wanted to render fruitless all his efforts since the beginning of his case.

29. The UNDT dismissed Appellant's application for want of prosecution because he did not respond to its inquiries dated 10 and 15 June 2020, and Appellant did not even respond to the 18 June 2020 Order cautioning him that failure to contact the tribunal could result in the dismissal of his application. Appellant has failed to explain to this Tribunal why

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The UNDT Judgment

31. Further, we find no error in the UNDT Judgment dismissing the application based on Article 19 and 36 of the UNDT Rules of Procedure.

32. Article 19 (Case management) of the UNDT Rules of Procedure provides:

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

33. Further, Article 36 (Procedural matters not covered in the rules of procedure) of the UNDT Rules of Procedure reads:!

1. All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute.

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Concurring Opinion of Judge Graeme Colgan

1. I agree with the result and the reasoning supporting it in this case, although for reasons that may become apparent from my following observations, it is in my view a marginal case. Because this is apparently the first occasion on which the Appeals Tribunal has been asked to

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