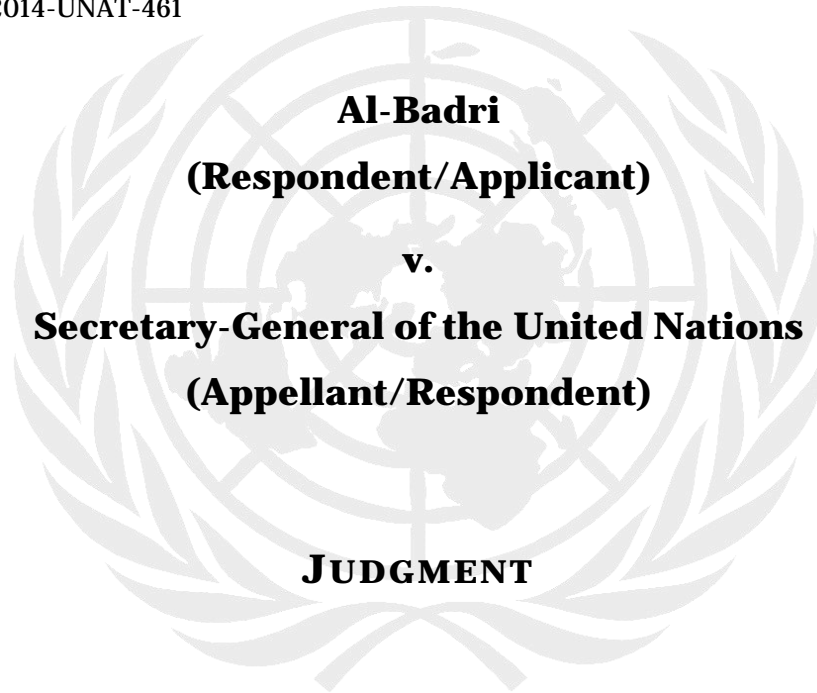




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-461



**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

Counsel for Ms. Al-Badri:	Self-represented
Counsel for Secretary-General:	Wambui Mwangi

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment on Receivability No. UNDT/2013/103, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 15 August 2013 in the case of *Al-Badri v. Secretary-General of the United Nations*. The Secretary-General appealed on 11 October 2013, and Ms. Shams Thamer Al-Badri answered on 12 December 2013.

Facts and Procedure

2. The facts established by the Dispute Tribunal in this case read as follows:¹

... The Applicant joined the [United Nations Development Programme (UNDP)] Country Office in Iraq (UNDP Iraq) on 21 December 2000 on a fixed-term appointment (FTA). In January 2003, she was appointed as a Human Resources Associate with UNDP Iraq at the GS-6 level. After the bombing of the United Nations Headquarters in Baghdad, Iraq, in 2003, the Applicant and other UNDP Iraq staff members were evacuated in December 2003 to Amman, Jordan.

... On 1 January 2004, she was appointed as an Operations Associate with UNDP Iraq at the GS-7, step 2 level.

... By a letter dated 31 October 2005, the Country Director, UNDP Iraq, informed the Applicant that since UNDP was not in a position to return to its office in Iraq in the near future, there was no longer an Iraq duty station for the Country Office. Thus UNDP management had decided that the new duty station for UNDP Iraq would be Jordan. He further informed her that as a result all the local posts in Iraq, including hers, would be abolished as of 31 January 2006 and would be replaced as of 1 February 2006 by the same local posts at the new duty station, under the Jordan local conditions.

... The Applicant was then offered the same post in Jordan that she had encumbered as a local staff member of the Iraq duty station. She accepted the offer and effective 1 February 2006 she held the position of Operations Associate at the G-7 level with [UNDP] Iraq in Amman.

... By an email dated 5 March 2009, the then Resident Representative provided a synthesis of the key issues discussed at a UNDP 2009 Retreat to all UNDP Iraq staff members. He informed the staff that the United Nations system was on a

¹ The following text is taken from Judgment No. UNDT/2013/103, paragraphs 1-22, with one paragraph relocated for easier reading (internal citations omitted).

“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 necessary because: (i) UNDP Iraq did not have any core operations staff in Baghdad; (ii) the increase of project activities and coordination functions in Baghdad; and (iii) the need to provide administrative assistance to the large number of staff going on missions from Amman to Baghdad.

... Human Resources Specialist from the Human Resources Unit (HRU) verbally informed the Applicant of the Country Director’s decision to relocate her post to Baghdad on 11 March 2010. Upon her request, a copy of the Country Director’s email was shown to her.

...

... The Deputy Resident Representative (Operations) informed all UNDP Iraq staff members on 21 March 2010 that the positions of Programme Specialist, Procurement Analyst, Operations Associate and Administrative Associate would be based in Iraq with immediate effect. This was followed up by an email from the Country Director dated 29 March 2010 to all UNDP Iraq staff members reiterating the relocation of the four positions to Baghdad.

... Subsequently, the Resident Representative informed the Applicant by a letter dated 26 April 2010 that her post in Amman would be abolished and that a new post at the same level would be established in Baghdad with new terms of reference. The Applicant was further informed that the new post in Baghdad would be advertised for competitive selection and that if she was not selected for the new post by 31 August 2010 she would be separated effective 1 September 2010.

... According to the Applicant’s submissions, she did not apply for the new post in Baghdad but rather applied for two positions based in Amman. She was informed on 9 June 2010 and 15 July 2010 that her applications for these positions were not successful.

... By a letter dated 8 August 2010 addressed to the Director of the UNDP Office of Human Resources, Bureau of Management (OHR/BOM), the Applicant requested management evaluation of the decision to abolish and transfer her post from Amman to Baghdad. ...

... In a response dated 25 August 2010, the Officer-in-Charge (OIC), OHR/BOM, confirmed the abolishment of the Applicant’s post in Amman as of 1 October 2010 and offered the Applicant, without resort to a competitive recruitment process, the post in Baghdad as it was the same post she was encumbering in Amman. The OIC informed the Applicant that she had up until 30 September 2010 to either accept or decline the

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 a 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-Badri 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/2013/103, 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 found Ms. Al-Badri’s claim against UNDP for refusing to extend the EOD in Baghdad to the end of March 2011 not receivable, as she did not raise the issue in her 29 March 2011 request for management evaluation, nor did she make any submissions in this regard in her filing with the UNDT dated 20 June 2013 when she was provided with an opportunity to comment on the receivability of her challenge of the decision in respect of her EOD in Baghdad.

Submissions

The Secretary-General’s Appeal

4. The present appeal is receivable because the UNDT exceeded its competence by finding that Ms. Al-Badri’s application was receivable, even though her request for management evaluation was submitted out of time. Ms. Al-Badri was informed of the decision to abolish her post in Amman and to establish a new post at the same level in Baghdad on 26 April 2010. Although she was required to request management evaluation of the contested decision by 25 June 2010, Ms. Al-Badri did not do so until 8 August 2010. This alone was a sufficient and mandatory basis for the UNDT to dismiss her application.

5. Ms. Al-Badri did not seek an extension of the 60-day deadline for requesting management evaluation, nor did the Secretary-General expressly or indirectly waive or extend her statutory deadline for such a request. In this regard, the Secretary-General submits that the UNDT has confused two separate and distinct deadlines regarding management evaluation. Staff Rule 11.2(c) governs the waiver of the 60-day deadline for submission of a request for management evaluation, whereas Staff Rule 11.2(d) governs the waiver of the 45-day deadline for consideration of such a request. In the present case, the Secretary-General only waived the 45-day deadline for consideration of Ms. Al-Badri’s request for management evaluation pending a possible informal resolution of the matter, but did not automatically waive the 60-day deadline for her submission of such a request.

⁴ *Id.*, para. 45.

6. The Secretary-General requests that the Appeals Tribunal reverse the UNDT's finding that Ms. Al-Badri's application was receivable, and set aside the Judgment in its entirety.

Ms. Al-Badri's Answer

7. The issue of meeting any deadline, even if it concerns staff-Organization mutual interest, should not be very strict so that it may serve the good purpose.

8. The delay in not meeting the deadline for submission of her request for management evaluation was mainly due to her waiting for a corrective measure from the Administration. During that time, she was communicating with the management in an attempt to avoid litigation. She was simply misguided by the management in order to have her miss the deadline. All requests made of her by the OHR and the Ombudsman's Office were complied with in good faith. The documents and correspondence that she shared with the Dispute Tribunal clearly show the ambiguities and irregularities committed by the UNDP Iraq Office.

9. Ms. Al-Badri requests that the Appeals Tribunal take a decision in her favour.

Considerations

Is the Secretary-General's appeal receivable?

10. The Secretary-General appeals the Dispute Tribunal's decision to admit to judicial review Ms. Al-Badri's challenge against the decision to abolish her post in Amman, Jordan and to create a new post at the same level in Baghdad, Iraq.

11. In the first instance, the Secretary-General contends that his appeal of this issue is receivable by the Appeals Tribunal on the basis that the Dispute Tribunal exceeded its competence by finding that Ms. Al-Badri's application was receivable.

12. In her answer to the appeal, Ms. Al-Badri does not address the Secretary-General's argument that the appeal of the Dispute Tribunal's Judgment on Receivability is receivable by the Appeals Tribunal. That notwithstanding, it is for the Appeals Tribunal to determine whether under Article 2 of its Statute it is competent to hear the present appeal and whether it is receivable under Article 7 of the Appeals Tribunal's Statute.

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) 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.

14. As we have consistently stated, the general principle underlying the right of appeal set out in Article 2(1) of the Appeals Tribunal Statute is that only final judgments of the UNDT are appealable. In *Tadonki*, we stated:

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.⁵

Furthermore, in that case, we held that “[o]nly when it is clear that the UNDT has exceeded its jurisdiction will a preliminary matter be receivable”.⁶

15. The Appeals Tribunal also considered the receivability of interlocutory appeals in *Bertucci* where it was stated:

In *Tadonki* ..., the Appeals Tribunal has emphasized that most interlocutory decisions will not be receivable, for instance, decisions on matters of evidence, procedure, and trial conduct. In *Calvani*, the Appeals Tribunal held that an appeal by the Secretary-General from an interlocutory order of the UNDT for the production of a document was not receivable. It observed that the UNDT had discretionary authority in case management and the production of evidence in the interest of justice and that, should the UNDT have committed an error in ordering the production of a document and have drawn erroneous conclusions in the final Judgment resulting from the failure to produce the requested document, it would be for the Secretary-General to appeal that judgment. The Appeals Tribunal has, however, held in *Tadonki* ..., *Onana*,

⁵ *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005, para. 18.

⁶ *Id.*, para. 11.

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 receivable.⁸

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. It requires adjudication on the merits and can therefore not be subject to an interlocutory appeal. The alleged lack of jurisdiction of the UNDT is not clearly

⁷ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, para. 21 (full bench; internal citations omitted).

⁸ *Id.*, para. 23.

established in this case and the issue cannot be decided before the UNDT has rendered a judgment on the merits of the case.⁹

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 jurisprudence that the Appeals Tribunal must determine the receivability of the present appeal.

21. It is clear from our jurisprudence that the alleged excess of jurisdiction or competence on the part of the UNDT, so as to admit an appeal of an interlocutory order or judgment, must be “clear” or “manifest”.¹³

⁹ *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-060, paras. 18-20 (internal citations omitted).

¹⁰ See *Bali v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-244; *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-230; *Ajdini et al. v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108 and *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008.

¹¹ *Wamalala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300, paras. 21-22.

¹² *Id.*, para. 22.

¹³ *El-Komy v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-324; *Bali v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-244; *Hersh v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-243; *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-230.

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.

Original and Authoritative Version: English

Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Simón

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar