



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

Judgment No. 2013-UNAT-306/Corr.1

Wu
(Appellant/Respondent on Cross-Appeal)
v.
Secretary-General of the United Nations
(Respondent/Appellant on Cross-Appeal)

JUDGMENT

Before: Judge Rosalyn Chapman, Presiding
Judge Mary Faherty
Judge Richard Lussick

Case No.: 2012-338

Date: 28 March 2013

Registrar: Weicheng Lin

Counsel for Appellant/Respondent on Cross-Appeal: Self-represented

Counsel for Respondent/Appellant on Cross-Appeal: Paul Oertly

Reissued for technical reasons on 29 May 2013

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Ming Wu against Judgment No. UNDT/2012/074, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 24 May 2012 in the case of Wu v. Secretary-General of the United Nations. Mr. Wu appealed on 28 June 2012 and, on 4 September 2012, the Secretary-General filed his answer and a cross-appeal challenging the UNDT's determinations on receivability and the merits. On 6 November 2012, Mr. Wu filed an answer to the Secretary-General's cross-appeal.

Facts and Procedure

2. In April 2010, Mr. Wu transferred to the Chinese Language Unit, Division of Conference Services, United Nations Office at Nairobi (UNON). He retired from his position on 30 June 2011. Prior to his retirement, on 18 April 2011, UNON's Human Resources Management Service (HRMS) sent Mr. Wu a detailed letter setting forth the separation procedures, benefits and allowances he would receive.

3. Mr. Wu disagreed with statements in the letter about the non-removal and unaccompanied shipment allowances, and he began a series of e-mail exchanges and discussions about the allowances with Ms. Deborah Ernst, Chief of the Staff Administrative Section (Chief/SAS). On 26 May 2011, Mr. Wu was advised that he was not entitled to the non-removal allowance and on 6 June 2011, he was advised that he was not entitled to the unaccompanied shipment allowance. Still dissatisfied, Mr. Wu sent an e-mail to the Office of Human Resources Management (OHRM) in New York, restating his requests. On 10 June 2011, OHRM advised Mr. Wu by e-mail (with a copy to the Chief/SAS) that the "unaccompanied shipment entitlement is not applicable" to the repatriation of a staff member who has the full removal entitlement and "a lump sum for non-removal allowance is not paid" on separation due to retirement.

4. The Dispute Tribunal set forth the following pertinent facts:¹

... [O]n 15 June 2011, Mr. Wu consulted the Ombudsman's Nairobi Office in an attempt to resolve the issue through informal procedure. On 17 June 2012 [sic], the Ombudsman convened a meeting between [Mr. Wu] and UNON's [Chief/SAS], in order to reach an informal solution. The attempt at informal resolution of the issue was unsuccessful and [Mr. Wu] wrote to the Secretary-General on 15 August 2011

¹ The following facts are taken from Judgment No. UNDT/2012/074, paragraphs 2-5.

requesting management evaluation of the impugned decision. A return receipt submitted as part of the case records shows that [Mr. Wu's] email was received by the Secretary-General on 15 August 2011.

... On 17 October 2011, [Mr. Wu] wrote to the Management Evaluation Unit (MEU) seeking clarification as to whether he was entitled to file an application with the [UNDT] since 45 days had elapsed from the date he had sought management evaluation of the impugned decision. The MEU wrote to [Mr. Wu] on 20 October 2011 advising him that they had no record of any correspondence from him prior to 17 October 2011 ...

... On 8 November 2011, the MEU informed [Mr. Wu] that his request for management evaluation was time-barred and was therefore not receivable. The reasons cited by the MEU included, inter alia, that "a staff member's preference to resort to negotiation with the Administration does not absolve him/her from the obligation to comply with the deadline stipulated in the staff rules."

... [Mr. Wu] filed the ... Application [in the UNDT] on 8 December 2011.

5. Other pertinent facts are set forth in Dispute Tribunal Order No. 012 (NBI/2012), issued on 20 January 2012:²

... The Application was transmitted to the Respondent on 13 December 2011 with a deadline of 13 January 2012 by which to file a Reply. The Application was transmitted using the eFiling portal of the Tribunal's Court Case Management System ("CCMS").

... On 16 December 2011, Counsel for the Respondent informed the Tribunal that she had not received the Application. On 20 December 2011, the Tribunal again advised Counsel for the Respondent that she was required to create an eFiling profile to access the case records ...

... On 20 December 2011, Counsel for the Respondent informed the Tribunal that she had elected not to create an eFiling account owing to certain noted limitations with that system and the fact that eFiling is not a compulsory requirement under the Tribunal's Rules of Procedure. ...

² The following facts are taken from paragraphs 2-8.

... On 21 December 2011, the Tribunal informed Counsel for the Respondent that it considered that the Application had been properly transmitted to her on 13 December 2011 and that the deadline to file a Reply by or before 13 January 2012 still applied.

... On 13 January 2012, Counsel for the Respondent filed an “An Application for Declaratory Order in respect of Articles [8(3), 8(4) and 10(1)] of the UNDT Rules of Procedure”. In the said Application, the Respondent seeks a declaratory order of the Tribunal indicating the responsibilities and rights of the parties in respect of the provisions of [articles] 8(3), 8(4) and 10(1) of the UNDT Rules of Procedure regarding the acceptable means of filing and receiving submissions with the Tribunal through its Registry offices. ...

... The Respondent’s Counsel also seeks a direction from the Tribunal requiring the Nairobi Registry to transmit to her, outside of CCMS, a copy of Mr. Wu’s Application.

6. In Order No. 012 (NBI/2012), addressing the Secretary-General’s application for a declaratory order, the UNDT declared that “submissions to the Tribunal may be transmitted electronically” or by hard copy and “Article 8(4) [of the UNDT’s Rules of Procedure] gives the Registrar the discretion to determine how to transmit an application” and the Registrar had exercised that discretion by using the eFiling portal. The UNDT then ordered the Secretary-General to file his reply no later than 20 February 2012, noting:

... As a result of Counsel for the Respondent’s decision not to create an eFiling account, she has failed to access the Application and to file a Reply within the requisite time limit required by [Article] 10 of the Tribunal’s Rules of Procedure. This means that by operation of procedural law, the Respondent is not entitled to take part in the proceedings except with the leave of the Tribunal.³

7. What happened next is set forth in Dispute Tribunal Order No. 032 (NBI/2012), issued on 21 March 2012:⁴

... In spite of the said declaratory Order of the Tribunal and its indulgence in granting the Respondent’s Counsel a further period of 30 days, the Respondent’s response was not filed as ordered. ...

³ Order No. 012 (NBI/2012), para. 17.

⁴ The following facts are taken from paragraphs 10-12.

... On 26 February 2012, the Respondent[’s Counsel] sent an email to the Tribunal stating:

Please note that through sheer inadvertence, I missed the 20 February 2012 deadline the Tribunal had set for the filing of Respondent’s reply. I had failed to carry the date in my electronic calendar.

I have prepared an application to open the record to permit the late filing of Respondents (sic) Reply, as well as the Respondent’s Reply, which submissions will be finalized and ready to be filed on CCMS on Monday, 27 February 2011. (sic) Alternatively, if the Tribunal is not disposed to entertain an application to open the record to allow for the late filing of Respondent’s Reply, I would be grateful if you would communicate the Tribunal’s wishes in this regard.

I wish to express my apologies to the Tribunal and Mr. Wu for the delay caused by my oversight.

... On 2 March 2012, the Respondent filed a Motion entitled “Respondent’s Application to file late Reply and participate in proceedings”.

8. The Secretary-General attached his nine-page answer to the motion. In his answer, the Secretary-General raised the defense that the application was not receivable because it was time-barred under Article 8(3) of the UNDT Statute and Staff Rule 11.2(c) due to Mr. Wu’s late request for management evaluation of the impugned decisions.

9. In Order No. 032 (NBI/2012), the Dispute Tribunal denied the Secretary-General’s motion to participate in the proceedings and to file a late reply, stating:⁵

... [T]he Tribunal is not convinced by the reasons proffered by Counsel and accordingly rejects her application for leave to re-enter the proceedings.

... [I]t would not be in the interests of justice and the integrity of the judicial process to continue to allow *Counsel* for the Respondent to act in clear disregard of the Tribunal’s Orders at the expense of the Applicant and the administration of justice. The Respondent’s *Counsel’s* application for leave to take part in the proceedings is accordingly refused. The consequence of this ruling is that the present Application will be considered as an undefended cause. (Emphasis added).

The Dispute Tribunal further stated that it “shall issue a default judgment in this case in due course”.⁶

⁵ Order No. 032 (NBI/2012), paras. 19 and 20.

10. On 24 May 2012, the Dispute Tribunal issued default Judgment No. UNDT/2012/074, in which it determined:

- (a) the application was receivable because the Secretary-General “effectively extended” the deadline for requesting management evaluation by his participation in the proceedings before the Ombudsman, and the time for requesting management evaluation did not commence to run until such informal resolution had failed;
- (b) the UNDT has authority on its own motion to take a default judgment against the Secretary-General, and it is not precluded from doing so by the Appeals Tribunal’s decision in *Bertucci*;⁷
- (c) Mr. Wu is entitled to “payment of the non-removal of personal effects and the non removal [sic] element of the mobility and hardship allowance”;
- (d) Mr. Wu is not entitled to the “payment of an additional 46 months of non-removal allowance”; and
- (e) Mr. Wu is entitled to “payment for charges incurred in the shipment of his personal effects and household goods”.

The UNDT then ordered the Secretary-General to pay Mr. Wu the non-removal allowance and the unoccupied shipment allowances with interest.

Submissions

Mr. Wu’s Appeal and Answer to Cross-Appeal

11. The UNDT erred on questions of law and fact within the meaning of Article 2(1)(c) and (e) of the Appeals Tribunal Statute (Statute) when it did not correctly interpret ST/AI/2007/1 and denied him “payment of an additional 46 months of non-removal allowance in respect to his transfer from UNOG to UNON” and also misunderstood his claim regarding “unaccompanied shipment in respect to his travel on separation,” based on Staff Rules 7.15(g) through (i) and 7.16(a).

12. The Secretary-General’s cross-appeal should not be received because he improperly “places new factual material” before the Appeals Tribunal regarding whether the UNDT exceeded its jurisdiction or competence by receiving his application.

⁶ *Ibid.*, para. 22.

⁷ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-121.

13. The UNDT correctly determined that Mr. Wu's request for management evaluation was timely and correctly extended the deadline for him to request management evaluation. Since he timely requested management evaluation, his application was properly received by the UNDT.

Secretary-General's Answer and Cross-Appeal

14. The UNDT, in rendering a default judgment, was required to properly apply the law to the merits of Mr. Wu's claims. The UNDT did not do this; rather, it made errors of law in determining Mr. Wu was entitled to the unaccompanied shipment allowance. While it correctly determined that he was not entitled to the non-removal allowance, it did so based on flawed reasoning.

15. The Secretary-General's cross-appeal is receivable despite the entry of a default judgment against him because the UNDT, in issuing the default judgment, exceeded its jurisdiction or competence by concluding the application was receivable, when it was not.

16. Mr. Wu did not timely request management evaluation "within sixty days from the date" he received notification of the impugned decisions, as required by Staff Rule 11.2(c). He received notification that he was not entitled to the allowances he challenged on 26 May and 6 June 2011, and confirmation of those decisions on 10 June 2011. His request for management evaluation should have been made no later than 9 August 2011. Instead, he did not make the request until 15 August 2011. Thus, Mr. Wu's request for management evaluation was tardy and the UNDT's determination that his application was receivable was a legal error.

17. The Secretary-General further contends that, by finding Mr. Wu's request for management evaluation to be timely, the UNDT effectively waived the deadline for a staff member to request management evaluation in violation of Article 8(3) of the UNDT Statute and, in doing so, the UNDT exceeded its jurisdiction or competence. The jurisprudence of the Appeals Tribunal clearly provides that the UNDT is acting in excess of its jurisdiction or competence when it extends or waives the deadline for making a management evaluation request, as the UNDT did in the present case. The UNDT also made an error of law when it determined that the time period for making a request for management evaluation ran from the unsuccessful completion of the Ombudsman's intervention, rather than from notification of the impugned decisions.

Considerations

The Secretary-General's Cross-Appeal Is Receivable

18. Article 2(1) of the Statute provides:

The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the [UNDT] in which it is asserted that the Dispute Tribunal has:

(a) Exceeded its jurisdiction or competence[.]

...

19. This Tribunal has repeatedly held that when the UNDT acts in excess of its jurisdiction and authority, the aggrieved party may bring an appeal, regardless of whether the ruling is called an order or a judgment.⁸

20. The Dispute Tribunal issued Judgment No. UNDT/2012/074 as a default judgment against the Secretary-General, who was not allowed to participate in the proceedings or to file a reply. As the party against whom a judgment is entered, whether default or otherwise, the Secretary-General may file an appeal challenging the judgment under any of the provisions of Article 2(1) of the Statute. On appeal, the Secretary-General challenges the default Judgment under Article 2(1)(a) of the Statute, claiming the UNDT exceeded its competence or jurisdiction by violating Article 8(3) of the UNDT Statute when it effectively waived the deadline for Mr. Wu to request management evaluation of the impugned decisions and then erroneously received his application, which was not receivable, *ratione materiae*.

Mr. Wu's Application Was Not Receivable Ratione Materiae By the Dispute Tribunal

21. Article 2(1) of the UNDT Statute confers jurisdiction on that Tribunal to hear applications appealing administrative decisions. An application "is only receivable when a staff member has previously submitted the impugned administrative decision for management evaluation and the

⁸ See *Costa v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-036; *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.

application is filed within the specified deadlines”.⁹ Under Article 8(3) of the UNDT Statute, “[t]he Dispute Tribunal shall not suspend or waive the deadlines for management evaluation”.

22. Staff Rule 11.2 (c) provides:

A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

23. The Chief/SAS advised Mr. Wu on 26 May and 6 June 2011 that he was not entitled to the non-removal and unaccompanied shipment allowances he sought, and OHRM confirmed those decisions on 10 June 2011. Yet, Mr. Wu did not request management evaluation of these decisions until 15 August 2011 – more than 60 days later. Even assuming *arguendo* that 10 June 2011 is the date of the impugned decisions, rather than the earlier dates of 26 May and 6 June 2011, Mr. Wu’s request for management evaluation is untimely. Since Mr. Wu did not make a timely request for management evaluation, his application to the UNDT was not receivable, *ratione materiae*.

24. In erroneously concluding that Mr. Wu’s request for management evaluation was timely, the UNDT stated:¹⁰

... [D]uring the period that the Ombudsman was seized of the matter, time would cease to run. ... The Ombudsman is appointed by the Secretary-General to represent him for the purposes of facilitating conflict resolution, using any appropriate means for the primary objective of settling conflicts between parties, and obviate recourse to the formal grievance process. During the two-day period that the Ombudsman was seized of the matter, that is, 15 to 17 June 2011, the deadline was effectively extended for the purposes of staff rule 11.2(c).

... The 60-day timeline in this case should have begun to run from 17 June 2011, the date when the attempt at informal resolution of the dispute by the Ombudsman failed. The Applicant therefore, as provided for in staff rule 11.2(c), had up to 17 August 2011 to file his request for management evaluation. Having filed his request for management evaluation on 15 August 2011, his request was made within 60 days and was receivable by the MEU. ...

⁹ *Ajdini et al. v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108, para. 23.

¹⁰ Judgment No. UNDT/2012/074, paragraphs 24 and 25.

25. The Dispute Tribunal's analysis contains several legal errors. First, Staff Rule 11.2(c) allows only the Secretary-General to extend a management evaluation deadline "under conditions specified by the Secretary-General". There is no evidence that the Secretary-General extended the management evaluation deadline or specified any conditions for extending it. Nevertheless, it is arguably not unreasonable, as the Secretary-General acknowledges, for the UNDT to infer that the Ombudsman's participation in the settlement negotiations amounted to the Secretary-General's implicit extension of the management evaluation deadline for the period of the negotiations, i.e., two days. Tolling the deadline for those two days would have extended the deadline until 11 August 2011. Yet, Mr. Wu's request for management evaluation was not made by that date.

26. Second, there is absolutely no legal authority for the UNDT to commence the running of the sixty-day limitation period from the end of the Ombudsman's settlement negotiations, rather than from "the date on which the staff member received notification of the administrative decision to be contested". The language of Staff Rule 11.2(c) is clear. Moreover, for the UNDT to commence the running of the sixty-day period in a manner inconsistent with Staff Rule 11.2(c) violates the statutory prohibition in Article 8(3) against the UNDT suspending or waiving the deadline for seeking management evaluation. This Tribunal has repeatedly and "consistently held that the UNDT has no jurisdiction to waive deadlines for management evaluation or administrative review".¹¹ Yet, that is what the UNDT did. In this regard, the Dispute Tribunal exceeded its jurisdiction or competence. Thus, the Secretary-General's cross-appeal should be affirmed and the default Judgment should be vacated.

27. Since Mr. Wu's application was not receivable *ratione materiae*, the UNDT had no jurisdiction or competence to address the merits of the claims in the application and those claims are not properly before this Tribunal for consideration. Therefore, this Court should dismiss Mr. Wu's appeal.

Judgment

28. Mr. Wu's appeal is dismissed; the Secretary-General's cross-appeal is affirmed; and Judgment No. UNDT/2012/074 is vacated.

¹¹ *Ajdini, ibid.*; *Trajanovksa v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-074; *Mezoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-043; *Costa v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-036.

Original and Authoritative Version: English

Dated this 28th day of March 2013 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Lussick

Entered in the Register on this 24th day of May 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar