



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

Judgment No. 2014-UNAT-455

**Guzman
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Luis María Simón
Judge Richard Lussick

Case No.: 2014-563

Date: 27 June 2014

Registrar: Weicheng Lin

Counsel for Ms. Guzman: Self-represented

Counsel for Secretary-General: Noam Wiener

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 Order No. 264 (NBI/2013), rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 20 December 2013 in the case of *Guzman v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 20 January 2014 and Ms. Mary Edel Guzman answered on 19 February 2014.

Facts and Procedure

2. The following matters are not in dispute:¹

... On 21 July 2013, the Applicant was issued with a fixed-term appointment effective 1 September 2013. The appointment was for 10 months from the effective date of appointment and was to expire on 30 June 2014.

... On 23 July 2013, the Applicant addressed a letter to Mr. Paul Johnson, Acting Director, Field Personnel Division in the Department of Field Support requesting the initiation of a rebuttal of her performance appraisal for the period 1 April 2012 to 31 March 2013. This letter was also copied to the Chief of Mission Support for [the United Nations Assistance Mission for Afghanistan (UNAMA)], Ms. Stephani Scheer.

... The Applicant contended that the then membership of the UNAMA rebuttal panel did not meet the requirement that the membership of the panel should be equal in grade or higher than that of the reporting officer whose performance evaluation or comments were being rebutted. She therefore sought to have a rebuttal panel instituted at the Headquarters level in New York.

... The Applicant was served with a notice of separation from service on 22 September 2013. The notice dated 15 September 2013 was titled "Separation notification due to downsizing of budgeted post eff. COB 31 December 2013." It was signed by the [Chief Civilian Personnel Officer (CCPO)], UNAMA, Ms. Jeanie Fraser and stated in part that

The change in circumstances relating to UNAMA's operations for 2014 has made it necessary to evaluate closely the current and future needs of the Mission and our operational effectiveness. At the conclusion of this exercise, the mission has identified a number of changes to be made in the staffing requirements which has resulted in various posts being abolished and/or

¹ *Guzman v. Secretary-General of the United Nations*, Order No. 264 (NBI/2013), paragraphs 4 to 10.

nationalized. These changes are due to restructuring of sections and offices and absorption of functions by other staff.

I regret to inform you that your post is one of those identified for downsizing in 2014. This decision is effective 31 December 2013

... On 22 October 2013, the Applicant sought the intervention of the Management Evaluation Unit (MEU) to suspend the decision to separate her from service pending the completion of a performance evaluation rebuttal process. She also made a request for management evaluation of the abolition of her post and impending separation that was to take effect on 31 December 2013.

... The MEU responded on 30 October 2013 and upheld the contested decision for which management evaluation had been sought.

... The Applicant again wrote to the MEU on 4 December 2013 requesting a suspension of the decision to separate her from service. The MEU responded to this on 10 December 2013 and upheld its decision taken on 30 October 2013.

Proceedings before the UNDT

3. Ms. Guzman filed an application with the UNDT on 15 December 2013 seeking, *inter alia*, rescission of the decision taken by the CCPO to separate her from service effective 31 December 2013. On the same date, she filed a motion for interim relief under Article 10(2) of the UNDT Statute seeking an Order suspending the decision to separate her from service which was due to be implemented on 31 December 2013. She filed an addendum to her interim application on 17 December 2013.

4. The UNDT considered firstly the receivability of Ms. Guzman's motion for interim relief. Finding it receivable, the UNDT then went on to consider whether the application met the three requirements for the granting of a suspension of action as stipulated by Article 10(2) of its Statute and Article 14 of its Rules of Procedure. It duly found that the application met the criteria set out in the aforesaid statutory instruments. Accordingly, the UNDT suspended the decision to separate Ms. Guzman from service pending the substantive hearing and determination of her application on the merits.

5. The Secretary-General filed an appeal against the UNDT Order on 20 January 2014 and Ms. Guzman filed her answer on 19 February 2014. On 25 March 2014, Ms. Guzman filed a "Motion for Addendum to Appellee's Brief/Reply..." and on 4 April 2014, the Secretary-General filed his comments on the motion.

Parties' Submissions**The Secretary-General's Appeal**

6. The Secretary-General appeals the suspension of action Order and his appeal is limited to whether the UNDT exceeded its competence in ordering the suspension of a termination decision until the final determination of the application on the merits notwithstanding the statutory prohibition thereon.

7. He submits that the appeal is receivable and submits that Article 2(1) of the UNDT Statute provides that an appeal may be filed against a judgment of the UNDT where it has "exceeded its jurisdiction or competence". The Secretary-General cites jurisprudence of the Appeals Tribunal which establishes that an appeal may be filed against an interlocutory Order in which the UNDT has exceeded its competence or jurisdiction.²

8. It is further submitted that the UNDT erred on a question of law and exceeded its competence by ordering the suspension of action of a termination decision. In Order No. 264, the UNDT ruled that Ms. Guzman's amended application did not seek to impugn a decision on appointment, termination or promotion and therefore it was competent to suspend the contested decision. The Secretary-General contends that in Ms. Guzman's request of 29 October 2013 to the MEU, she asked the MEU to examine her termination from the Organization and specifically requested the MEU for an evaluation of "the decision to prematurely separate [her] from the UN/UNAMA". In her application form to the UNDT, Ms. Guzman described the contested decision as the "[u]nlawful separation based on the alibi of post abolishment; [s]eparation from service pending completion of ePas rebuttal". She identifies the date of the contested decision as 22 September 2013. The Secretary-General submits therefore that it is clear that the decision being contested was the decision informing her of her separation from service prior to the expiry of her fixed-term appointment. He refers to Staff Rule 9.6(a) as defining termination as a "separation from service initiated by the Secretary-General". Pursuant to Staff Rule 9.6(c)(i), one basis for termination may be "abolition of posts or reduction of staff".

² The Secretary-General cites *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005; *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008; and *El-Komy v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-324.

9. The Secretary-General argues that the exclusionary provision in Article 10(2) of the UNDT Statute, as replicated in Article 14 of its Rules of Procedure, provides that the UNDT may, as an interim measure “suspend the implementation of the contested administrative decision, except in cases of appointment, promotion, or termination”. He states that the UNDT sought to distinguish the present case from other instances where Article 10(2) applies by saying that all cases that come before the UNDT are somehow related to “the capacity of staff members under employment contract or appointment” and that “it is only in cases where the subject-matter of an application seeks to impugn an appointment, termination, or promotion decision that interim relief cannot be ordered”.

10. The Secretary-General however submits that Ms. Guzman’s amended application directly impugns a termination decision and accordingly its suspension by the UNDT is prohibited by Article 10(2). He also argues that the prohibition on suspending certain categories of decisions is consistent with the need for the Organization to have flexibility in its management of personnel. Furthermore, decisions on the appointment, promotion and termination of staff members affect the rights of other staff members as well as the overall functioning of the Organization. As such, those decisions cannot be suspended for indeterminate periods pending final adjudication by the UNDT. For those reasons the General Assembly agreed with the Secretary-General’s proposal to circumscribe the UNDT’s authority as set out in Article 10(2). In this regard the Secretary-General relies on the jurisprudence of the Appeals Tribunal in the *Kasmani* case.³

11. The Secretary-General requests the Appeals Tribunal to annul Order No. 264.

Ms. Guzman’s Answer

12. Ms. Guzman argues that the Secretary-General’s appeal is not receivable since it is an appeal against an order of suspension of action and she contends that appeals against such orders are clearly prohibited by the UNDT’s Statute and Rules of Procedure.

13. She states that the contested decision has only one meaning and implication, namely “the unlawful removal of [Ms. Guzman] from [her] job, the unlawful separation of [Ms. Guzman] from UN service – due to a false alibi proffered by the [Secretary-General] using post abolishment”.

³ *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011.

14. Ms. Guzman maintains that her post no. 61573 has not been abolished, that she has occupied this post since 2006 and that the post has been reclassified, namely upgraded from P-4 to P-5. In this regard she draws the Appeals Tribunal's attention to the Secretary-General's report on UNAMA to the General Assembly dated 10 October 2013 and the General Assembly's report dated 29 November 2013, both of which confirm the reclassification of the P-4 post of Chief Conduct and Discipline Officer (CDO) to P-5. Furthermore, as evidence that her post was not abolished she refers to a communication dated 8 January 2014 to her wherein she was requested to sign a form to facilitate the reclassification of her P-4 post to a P-5.

15. Ms. Guzman submits that the UNDT did not err and did not exceed its authority but rather exercised its inherent jurisdiction to safeguard the integrity of the internal justice system in view of the continuing and deliberate misrepresentation of facts by the Secretary-General. She maintains that his continuing conduct of misrepresenting the facts is a manifestation of continuing harassment of her with the intent to get rid of her and to deprive her of her due process right to compete for the P-5 Chief CDO post for which she is duly qualified. She submits that the misrepresentation of facts constitutes an abuse of the appeals process. She requests the Appeals Tribunal to find the Secretary General's appeal not receivable and to uphold Order No. 264.

Ms. Guzman's Motion to file an Addendum to her Answer to the Secretary-General's Appeal

16. Ms. Guzman seeks to adduce "additional evidence that post number 61573 has been approved for reclassification from P4 to P5" and requests that the Appeals Tribunal censure the Secretary-General and his agents for abusing the appeals process.

17. The Secretary-General requests the Appeals Tribunal to dismiss Ms. Guzman's motion on the grounds that her evidentiary submissions on the nature of the contested post do not purport to establish any facts that are relevant to the appeal. He submits that the appeal is strictly limited to the UNDT's lack of competence to issue an interim measure suspending a decision to terminate an appointment.

18. Moreover, he submits that he is doing no more than exercising his right to appeal based on his understanding of the law and accordingly, there is no merit in Ms. Guzman's assertion that he and his agents are abusing the appeals process.

19. The Secretary-General requests that the motion be dismissed in its entirety.

Considerations

Ms. Guzman's Motion to file Addendum to Answer to Secretary-General's Appeal

20. The Appeals Tribunal deals firstly with Ms. Guzman's motion of 25 March 2014 to file an addendum to her answer to the Secretary-General's appeal. Having reviewed the nature of the documentation she wishes to adduce, we are satisfied to reject her application on the ground that the material she wishes to submit is more properly a matter for the hearing on the merits of her case and is not germane to the issue which the Appeals Tribunal has to determine in this appeal. That issue is whether the UNDT exceeded its competence in suspending the implementation of the decision to separate Ms. Guzman from service on 31 December 2013, pending the substantive hearing and determination on the merits. Accordingly, the motion to file additional evidence is dismissed.

21. In her answer to the Secretary-General's appeal, Ms. Guzman requests the Appeals Tribunal to find that the Secretary-General's appeal constitutes an abuse of process and in her motion of 25 March 2014 she asks that the Secretary-General and his agents be censured. Having reviewed Ms. Guzman's complaint in this regard, we do not find any basis to make the requested findings.

Did the UNDT commit an error of law and exceed its competence in making the Order of 20 December 2013?

22. Article 10(2) of the UNDT Statute provides:

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 implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

23. Article 2(1) of the Appeals Tribunal Statute provides that, *inter alia*, an appeal may be filed against a judgment of the UNDT where that Tribunal has “[e]xceeded its jurisdiction or competence”.

24. In accordance with this provision, and mindful that the restriction on the right of appeal against interim orders, provided for by Article 10(2) of the UNDT Statute, should be narrowly construed, the Appeals Tribunal has held that the right to appeal lies against an interlocutory order in which the UNDT has exceeded its jurisdiction or competence.⁴

25. The Secretary-General submits that the Dispute Tribunal erred on a question of law and exceeded its competence by ordering the suspension of a termination decision, notwithstanding the prohibition on suspending such decisions in Article 10(2) of its Statute.

Was the suspended decision a termination decision?

26. Addressing the nature of the contested decision, the Dispute Tribunal stated:

The Respondent’s submission is that the Tribunal may not grant the order because it would be related to the Applicant’s appointment. This interpretation is totally misleading. The effect of the words “appointment”, “promotion” and “termination” as used in art. 10 of the Statute and art. 14 of the Rules of Procedure simply mean that where a suspension of action application challenges an appointment, termination or promotion, the Tribunal cannot grant an interim relief. In other words, it is only in cases where the subject-matter of an application seeks to impugn an appointment, termination or promotion that the interim relief cannot be ordered.⁵

27. While the Dispute Tribunal would appear to conclude that the decision in issue was not a termination decision, it did not clarify in the above paragraph the exact nature of the contested decision under its consideration.

28. We find, however, that the UNDT’s conclusion that the contested decision was not affected by the exclusionary provision of Article 10(2) of its Statute and Article 14 of its Rules of Procedure is not supported by the contents of Ms. Guzman’s amended motion of 17 December 2013, which states unequivocally that the decision for which suspension was

⁴ *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005; *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008; and *El-Komy v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-324.

⁵ Impugned Judgment, para. 25.

sought was the decision to separate her from service effective 31 December 2013, i.e. prior to the expiry of her fixed-term appointment. Indeed, at paragraph 36 of its Order, the Dispute Tribunal acknowledges that the decision conveyed to Ms. Guzman was the decision to “*terminate her services ... effective 31 December 2013*”.⁶ It is clear that the decision being contested was the decision informing Ms. Guzman of her separation from service prior to the expiry of her fixed-term appointment. Staff Rule 9.6(a) defines termination as a “separation initiated by the Secretary-General” and pursuant to Staff Rule 9.6(c)(i), one basis for termination may be the “abolition of posts or reduction of staff”.

29. We are thus satisfied that the decision, the subject matter of the application for interim relief before the Dispute Tribunal, was a termination decision.

30. Accordingly, the Dispute Tribunal was not competent to order the suspension of action and in doing so exceeded its competence.

Judgment

31. The Secretary-General’s appeal is receivable and well founded. UNDT Order No. 264 (NBI/2013) is vacated.

⁶ Emphasis added.

Original and Authoritative Version: English

Dated this 27th day of June 2014 in Vienna, Austria.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Simón

(Signed)

Judge Lussick

Entered in the Register on 29th day of August 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar