



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

Case No. 2010-066

**Wasserstrom
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Sophia Adinyira
Judge Mark P. Painter

Judgment No.: 2010-UNAT-060

Date: 1 July 2010

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Mary D. Dorman

Counsel for Appellant/Respondent: Phyllis Hwang

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. The Secretary-General has filed an interlocutory appeal against the decision of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) that the determination by the Director of the Ethics Office that no retaliation occurred constitutes an administrative decision that fell within the jurisdiction of the UNDT; and against its order to disclose the investigation report of the Office of Internal Oversight Services (OIOS) to James Wasserstrom (Wasserstrom). With regard to the first decision, going directly to the merits, and the second decision, concerning evidentiary matters, the Appeals Tribunal holds that the interlocutory appeals against both decisions are not receivable.

Facts and Procedure

2. In May 2007, Wasserstrom was informed that his appointment would not be continued due to a reduction of posts in the United Nations Interim Administration Mission in Kosovo (UNMIK). He then concluded an employment contract with Pristina Airport and Post Telecom Kosovo, which was to commence following the completion of his assignment with UNMIK on 1 July 2007. On 31 May 2007, Wasserstrom was informed that he was under investigation for concluding the employment contract. On 3 June 2007, Wasserstrom filed a complaint with the Ethics Office, claiming that the actions taken by the Organization not to extend his appointment and to initiate an investigation against him amounted to retaliation.

3. The Ethics Office referred his case to the OIOS for investigation, which, on 8 April 2008, concluded that there was no retaliation, and that the Organization's actions were justified. Based on the OIOS investigation report, the Ethics Office determined that "there cannot be a finding of retaliation in this case". This conclusion, together with a summary of the findings of the OIOS investigation, was sent to Wasserstrom by the Director of the Ethics Office in a letter dated 21 April 2008.

4. On 21 May 2008, Wasserstrom requested an administrative review of the outcome of the investigation into his request for protection from alleged retaliation. The request

was rejected on 8 August 2008 because the Administrative Law Unit considered that the letter of 21 April 2008 did not constitute an administrative decision that was susceptible to challenge. Wasserstrom's appeal before the Joint Appeals Board was subsequently transferred to the UNDT.

5. On 3 February 2010, the UNDT issued an Order in which it addressed the receivability of Wasserstrom's application and ordered the production of documents by the Secretary-General. The UNDT found that the decision of the Director of the Ethics Office that no retaliation occurred constituted an administrative decision and that the application was receivable.

6. On 22 March 2010, the Secretary-General filed an appeal against the Order. Wasserstrom filed his answer on 6 May 2010. The Secretary-General filed "observations" on 21 May 2010. On 27 May 2010, Wasserstrom responded to the "observations".

Submissions

Secretary-General's Appeal

7. The Secretary-General submits that the impugned Order is a judgment within the meaning of Article 2(1) of the Appeals Tribunal's Statute (Statute), and that the appeal is therefore receivable.

8. The Secretary-General submits that the UNDT erred in law and exceeded its jurisdiction in concluding that the determination by the Director of the Ethics Office that no retaliation had occurred constituted an administrative decision that fell within the jurisdiction of the UNDT.

9. The Secretary-General alleges that the UNDT exceeded its competence by ordering the Ethics Office to disclose the OIOS investigation report to Wasserstrom. He further alleges that the UNDT erred on a question of law in finding that the Director of the Ethics Office should have sought the views of Wasserstrom before concluding that no retaliation had occurred.

10. The Secretary-General requests the Appeals Tribunal to vacate the impugned Order and to order that Wasserstrom's application before the UNDT be rejected as non-receivable.

Wasserstrom's Answer

11. Wasserstrom argues that the appeal is not receivable and should be dismissed. He requests that he be awarded costs and attorney's fees.

12. In the alternative, Wasserstrom requests the Appeals Tribunal to affirm the UNDT's finding that the decision of the Director of the Ethics Office of no retaliation against Wasserstrom was an administrative decision within its competence; to affirm the UNDT's competence to order production of documents and evidence; to award him costs and legal fees; and to order any other relief that the Appeals Tribunal deems just and proper.

Considerations

13. As a preliminary matter, the Appeals Tribunal notes that Articles 8 and 9 Of the Appeals Tribunal's Rules of Procedure (Rules) provide for an appellant to submit an appeal form, accompanied by a brief, and for a respondent to submit an answer form, accompanied by a brief. There is no provision under the Rules for additional pleadings to be submitted by the parties after the answer.

14. Under Article 6 of the Statute and Article 31(1) of the Rules, the Appeals Tribunal may allow additional pleadings in exceptional circumstances. The parties have not demonstrated any exceptional circumstances justifying the need for additional pleadings. Accordingly, the Appeals Tribunal decides to strike out the additional submissions and not to take them into consideration.

15. The Appeals Tribunal turns to consider whether under Article 2 of its Statute, it is competent to hear the present appeal, and whether it is receivable under Article 7 of its Statute. Article 2(1) of its Statute, which establishes the competence 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.

16. The Appeals Tribunal considered the receivability of interlocutory appeals in *Bertucci*:¹

24. In *Tadonki (No.1)*, 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 (No.1)*, *Onana*, and *Kasmani*, that an interlocutory appeal is receivable in cases where the UNDT has clearly exceeded its jurisdiction or competence.

...

26. 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.

17. The Secretary-General argues that the UNDT exceeded its jurisdiction twice: in concluding that the determination by the Director of the Ethics Office that no retaliation had occurred constituted an administrative decision that fell within the jurisdiction of the UNDT; and by ordering the Ethics Office to disclose the OIOS investigation report to Wasserstrom.

18. 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

¹ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062 (footnotes omitted).

depends on the subject-matter and 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.

19. 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.

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

21. The Appeals Tribunal further holds that the appeal against the UNDT's order for production of documents is not receivable, because it is interrelated with the alleged lack of jurisdiction. Also, as previously held by the Appeals Tribunal in *Tadonki (No. 1)*,² interlocutory appeals on matters of evidence, procedure, and trial conduct are not receivable.

² *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005, para. 11.

Judgment

22. For the foregoing reasons, the appeal is not receivable and is dismissed.

Dated this 1st day of July 2010 in New York, United States.

Original: English

(Signed)

Judge Simón, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Painter

Entered in the Register on this 16th day of August 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar
United Nations Appeals Tribunal