



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

Judgment No. 2020-UNAT-1058

Yves P. Nadeau

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Jean-François Neven, Presiding Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2020-1357
Date:	30 October 2020
Registrar:	Weicheng Lin

Counsel for Appellant: Peter A. Gallo

Counsel for Respondent: Noam Wiener

JUDGE JEAN-FRANÇOIS NEVEN, PRESIDING.

1. Mr. Yves P. Nadeau filed an appeal against Case Management Order No. 184 (NY/2019) and requested that Orders Nos. 184 (NY/2019) and 169 (NY/2019) be rescinded and that the case be remanded to the Dispute Tribunal. We dismiss this appeal finding that the Appellant does not demonstrate that the Dispute Tribunal clearly exceeded its jurisdiction or competence

Facts and Procedure

2. Mr. Nadeau, the Appellant, is a former staff member of the Office of Internal Oversight Services (OIOS). He filed an application on 19 March 2019 before the Dispute Tribunal in New York contesting the decision to terminate his continuing appointment for unsatisfactory performance.¹

3. Per Order No. 107 (NY/2019) on Case Management dated 15 July 2019 (Order No. 107), the UNDT had limited the administrative decision under review to that of his termination (whether it was lawful and if unlawful what relief should be given) and ordered the parties to submit *inter alia*: a list of any additional documentation they sought to admit or to have the other party to produce, along with an explanation as to the relevance of each document; and a list of witnesses they wished to call along with a brief statement of the summary of the facts to be addressed by each witness.

4. The parties could not agree on a joint list of agreed and disputed facts. In response to Order No. 107, the Appellant submitted a list of the facts he deemed relevant to the dispute and a list of 37 witnesses he wished to call to testify.

5. On 29 November 2019, the UNDT issued Order No. 169 (NY/2019) on Case Management (Order No. 169). The UNDT noted that neither party sought to submit additional documents into evidence and that “all the written documentation on which the termination decision was based appears to have been submitted in evidence”.² Thus, the UNDT held that the case was “fully informed” observing that the Appellant “ha[d] not explained why or how the proposed witness testimonies would add anything of additional significance”.³ The UNDT denied the

¹ Mr. Nadeau filed an application on 19 March 2019, and the UNDT registered the case as Case No. UNDT/NY/2019/018.

² Order No. 169, para. 6.

³ *Ibid.*, para. 7.

Appellant's request to call the 37 witnesses. Finally, the UNDT ordered the parties to submit their closing arguments.

6. Subsequent to the Appellant's closing argument deadline, he submitted a request to introduce new documents into evidence and the UNDT to order the Organization to produce e-mail correspondence amongst various staff members of OIOS and the Office for Human Resources (OHR), and between legal counsel from the Administrative Law Division representing the Secretary-General before the UNDT. The Appellant also requested that the official status files of staff members not party to this case be turned over to the UNDT for *ex parte* review.

7. On 26 December 2019, the UNDT issued Order No. 184 (NY/2019) on Case Management (Order No. 184) and held that considering the scope of the dispute and the fact that the "entire trail of written correspondence leading up to the contested administrative decision is already on file",⁴ holding an oral hearing or ordering the production of vast amounts of documents whose relation to the case have only been asserted by the Appellant in the most general of terms would not shed any further light on the case and aid in its disposition. The UNDT denied the Appellant's request and ordered the parties to submit their closing submissions.

8. On 20 January 2020, the Appellant filed the instant appeal against Case Management Order No. 184 (NY/2019).

9. On 27 January 2020, the UNDT issued its final judgment in the case as Judgment No. UNDT/2020/013.⁵

10. On 26 February 2020, the Secretary-General filed his answer to the appeal.

⁴ Order No. 184, para. 13.

⁵ Mr. Nadeau appealed this Judgment before the United Nations Appeals Tribunal (Appeals Tribunal) (Appeals Tribunal Case No. 1378).

Submissions

The Appellant's Appeal

11. The Appellant requests that the Appeals Tribunal rescind Orders Nos. 184 and 169 and remand the case to the UNDT for additional findings of fact including an oral hearing to examine the witnesses identified by the Appellant.

12. The UNDT erred when it denied Mr. Nadeau's requests for discovery of documents and submission of additional evidence that Mr. Nadeau did not previously know existed – namely evidence the impugned administrative decision (his separation based on poor performance) was made on the basis of recommendations that were prejudiced, tainted with bad faith or otherwise influenced by improper factors. In *Wilson*,⁶ the Appeals Tribunal overturned the UNDT's refusal to admit additional evidence that had only come into the applicant's possession after the parties had filed their closing arguments. Here, additional evidence was identified before the proceedings could formally be considered "closed". The UNDT has nevertheless sought to exclude it on the basis that it was the Appellant's responsibility to introduce it earlier, but this was not possible as much of the information only became known as a result of ongoing enquiries. This evidence was always known to the Respondent. Denying the Appellant access to documents controlled by the Respondent and denying him the opportunity to cross-examine the Respondent's witnesses equates to the UNDT accepting the Respondent's unproven pleadings as a *praesumptio iuris et de iure* – and by so doing the UNDT has erred in law and so exceeded its jurisdiction.

13. Per *Sanwidi*,⁷ one of the four elements within the scope of an administrative review is that the UNDT must establish that the decision was reached in a manner that is legal, which cannot be the case if the process by which it was reached is tainted by malice, bias, misrepresentation or the withholding of material evidence. The UNDT cannot determine whether the decision was lawful without evidence regarding whether (a) the decision-maker was aware of his October 2018 mid-point review or (b) this information was withheld by either (i) OIOS or (ii) the Assistant Secretary-General of the Office of Human Resources Management (ASG/OHRM). Either would indicate bad faith, but by denying him access to

⁶ *Wilson v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-940.

⁷ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

communications relating to his own performance, the UNDT is denying him the only legal means available to meet that burden of proof.

14. The Respondent has not denied that his medical condition impacted his performance in the Investigations Division. By denying his request for discovery of e-mail communications, the Tribunal has denied him the ability to prove whether the ASG/OHRM knowingly ignored the effect of his medical condition or whether this information had been withheld by OIOS. Either one would indicate bad faith and that a relevant matter had been ignored.

15. The information the Appellant sought to introduce and the evidence he ought to discover were material to proving such partiality, unfairness and dishonesty, and were necessary to impugn the credibility of the Respondent's witnesses.

The Secretary-General's Answer

16. The appeal is not receivable as an appeal against an interlocutory decision of the UNDT is only receivable where the UNDT has clearly exceeded its competence or jurisdiction.

17. The Appellant has failed to demonstrate that the UNDT clearly exceeded its jurisdiction or competence.

18. The UNDT defined the scope of the case and invited parties to adduce evidence falling within that scope. The Appellant attempts to broaden the scope of the dispute and to submit into the record, or receive, documents that are outside of the defined scope.

19. The Appellant did not provide any justifiable reasoning for the questioning of the witnesses or the production of evidence in a manner that relates to the contested decision being adjudicated. Thus, the UNDT's rejection does not exceed its competence and jurisdiction. It actually follows the Appeals Tribunal precedent in *Rangel*⁸ which held requests for production of voluminous documents in general terms are impermissible fishing expeditions.

⁸ *Rangel v. International Court of Justice*, Order No. 256 (2016).

20. The appeal should be dismissed in its entirety.

Considerations

21. Pursuant to Article 19 of the UNDT Rules of Procedure, the UNDT “may at any time, either on 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”.

22. This Tribunal decides:⁹

... Under the new system of administration of justice, the UNDT has broad discretion with respect to case management. ...

... 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. ...

23. By Order No. 184, the UNDT dismissed a request filed after the deadline granted to Mr. Nadeau by Order No 169 to file his closing statements. This request aimed to introduce new documents into evidence and the UNDT to order the Organization to produce, *inter alia*, e-mail correspondence among various staff members of OIOS and OHR.

24. Article 2(1) of the Statute provides, *inter alia*, that “[t]he 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 ... [e]xceeded its jurisdiction or competence”.

Is the appeal against an interlocutory order of the Dispute Tribunal receivable?

25. As previously held by the Appeals Tribunal in *Tadonki*,¹⁰ interlocutory appeals on matters of evidence, procedure, and trial conduct are not receivable.

⁹ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, paras. 22-23; see also *Monarawila v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-694, para. 28.

¹⁰ *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005, para 11.

26. In *Reilly*, we decided:¹¹

... The impugned Orders are case management or interlocutory orders. Article 2(1) of the Statute provides that the Appeals Tribunal can hear an appeal from a “judgment” rendered by the Dispute Tribunal. It does not clarify whether the Appeals Tribunal may only hear an appeal from a final judgment of the Dispute Tribunal or whether an interlocutory or interim decision made during the course of the Dispute Tribunal’s proceedings may also be considered a judgment subject to appeal.

... However, the Appeals Tribunal has previously held that appeals against most interlocutory decisions will not be receivable, in particular, decisions on matters of evidence, procedure, and trial conduct. An interlocutory appeal is only receivable in cases where the Dispute Tribunal has *clearly* exceeded its jurisdiction or competence.

... Whether an interlocutory appeal will be receivable depends on the subject-matter and consequences of the impugned decision and whether the impugned decision goes directly to the merits of the case. As established in *Bertucci*, the appellant has the onus of proving that the Dispute Tribunal has clearly exceeded its jurisdiction or competence.

27. The Appellant has the onus of proving the Dispute Tribunal “clearly” exceeded its jurisdiction or competence. This will not be the case in every interlocutory decision by the UNDT, even when the UNDT makes an error of law: “[i]f 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”.¹²

28. We find that the Appellant does not provide evidence that the Dispute Tribunal “clearly” exceeded its jurisdiction or competence in rejecting his request for new documents to be introduced into evidence. This issue can be raised in the appeal against the final Judgment on the merits. The Appeals Tribunal is competent to review whether certain facts remained

¹¹ *Reilly v Secretary-General of the United Nations*, Judgment No. 2019-UNAT-975, paras. 27 to 29 (footnotes omitted) (original emphasis), citing *Villamorán v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062; *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; and *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.

¹² *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-060, para. 19; see also *Chemingui v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-641, para. 18.

unresolved at the UNDT level and to consider the need for factual determinations based on the whole of the relevant evidence.¹³

29. The appeal is not receivable.

¹³ *Wilson v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-940, paras. 37-38.

Judgment

30. The appeal is dismissed and Orders Nos. 184 and 169 (NY/2019) are hereby affirmed.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)

Judge Neven, Presiding
Brussels, Belgium

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

Entered in the Register on this 16th day of December 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar