



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2013-UNAT-300

Wamalala
(Respondent/Applicant)

v.

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

JUDGMENT

Before: Judge Sophia Adinyira, Presiding
Judge Richard Lussick
Judge Rosalyn Chapman

Case No.: 2012-332

Date of Judgment: 28 March 2013

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Miles Hastie

Counsel for Appellant/Respondent: Simon Thomas

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations on 15 June 2012 against Judgment No. UNDT/2012/052, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 17 April 2012 in *Wamalala v. Secretary-General of the United Nations*.

Facts and Procedure

2. Mr. Gaston Nkulu Wamalala is a staff member of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUSCO). On 13 February 2009, he was involved in a road traffic accident while traveling in a United Nations' military vehicle. That same day, he was taken to a Level 3 hospital in the Democratic Republic of the Congo (DRC), and on 18 February 2009, he was evacuated to a Level 4 hospital in South Africa. After he was admitted to the Level 4 hospital, he underwent emergency surgery which included above-knee amputation of his right leg.

3. By claim form dated 1 July 2009, Mr. Wamalala submitted a claim to the Advisory Board on Compensation Claims (ABCC) for compensation under Appendix D to the Staff Rules. On 25 June 2010, the ABCC recommended, inter alia, that Mr. Wamalala's injuries be recognized as attributable to the performance of official duties on behalf of the United Nations and that he receive compensation in the amount of USD 49,114.03. On 17 August 2010, the recommendation was approved by the Controller, on behalf of the Secretary-General.

4. On 23 September 2011, Mr. Wamalala filed an application before the UNDT challenging the award for compensation by the Secretary-General based on the recommendation of the ABCC. In addition to that, he added a claim for compensation for moral/non-pecuniary damages in the amount of three years' net base salary, fixed at USD 45,000 "for pain and suffering, and the gross negligence of the Administration in failing to adequately ensure the safety and security of the Applicant through his service and treatment".¹

5. On 23 February 2012, the Secretary-General filed a "Motion for Leave to Have Receivability Considered as a Preliminary Issue". The UNDT disposed of the motion on 17 April 2012. The UNDT found that under Staff Rule 11.2(b), Mr. Wamalala was not required to

¹ Mr. Wamalala's application before the UNDT, para. 43.

request management evaluation of the Secretary-General's decision to award compensation in the amount of USD 49,114.03, since this decision was based on the ABCC's recommendation. It further found that the claim relating to negligence and the claim relating to the amount of compensation did not constitute separate claims, and should be determined together. The UNDT therefore concluded that the application was receivable and that it had jurisdiction to entertain it.

6. The Secretary-General appealed the UNDT Judgment on 15 June 2012 and Mr. Wamalala filed his answer on 21 August 2012.

Submissions

Secretary-General's Appeal

7. The Secretary-General submits that the present appeal is receivable. He contends that the UNDT erred in law and exceeded its competence by finding Mr. Wamalala's claim of negligence receivable. It is his understanding of the Appeals Tribunal's jurisprudence that the Appeals Tribunal will consider interlocutory appeals where the decision on receivability turns on a procedural matter that has already been settled by the Appeals Tribunal. The question of whether or not management evaluation is a mandatory first step in the

10. The Secretary-General requests that the Appeals Tribunal overturn the UNDT Judgment and find Mr. Wamalala's application before the UNDT not receivable to the extent

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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 established in this case and the issue cannot be decided before the UNDT has rendered a judgment on the merits of the case.⁶

20. On the other hand, in *Ajdini et al.*⁷ and similar cases 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, the appeals of such UNDT Judgments and even Orders were held to be receivable.

21. In the case before us, the Secretary-General submits that a staff member is required to request management evaluation of certain administrative decisions prior to seeking the UNDT's review of such decisions. In this case, clearly an applicant has not submitted the contested or impugned decision for management evaluation prior to filing an application before the UNDT. The UNDT is consequently not competent to determine the matter.

22. In the view of this Tribunal, the Secretary-General has clearly established the lack of jurisdiction of the UNDT and hence we make 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

⁶ *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-060.

⁷ *Ajdini et al. v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108.

⁸ See i.e. *Bali v. Secretary-General of the United Nations*, Judgment 2012-UNAT-244; *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-230; *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008.

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27. Accordingly, a claim of gross negligence against the Administration is a separate action which cannot be included in a claim made by a staff member under Appendix D.

Is the claim of gross negligence receivable?

28. The Secretary-General contends that Mr. Wamalala has not submitted his claim of gross negligence for management evaluation and that the UNDT therefore erred in finding that it was receivable.

29. Under Staff Rule 11.2(a), a staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent Regulations and Rules pursuant to Staff Rule 11.1(a) shall, as a first step, submit to the Secretary-General in writing a request for management evaluation of the administrative decision.

30. Under the UNDT Statute, the Dispute Tribunal is not competent to hear and pass judgment on a claim for gross negligence against the Secretary-General that has not been the subject of an administrative decision and thereafter, management evaluation. Under Article 8(1)(c) of the UNDT Statute, an application is receivable if “[a]n application has not been previously considered by the Dispute Tribunal.” The Tribunal finds that the application in this case is receivable. Accordingly, since Mr. Wamalala has not submitted his claim of gross negligence for management evaluation, the Tribunal finds that the Secretary-General’s contention that the claim is not receivable is not supported by the evidence. The Tribunal therefore finds in favor of the applicant.

Original and Authoritative Version: English

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

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Chapman

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

(Signed)

Weicheng Lin, Registrar