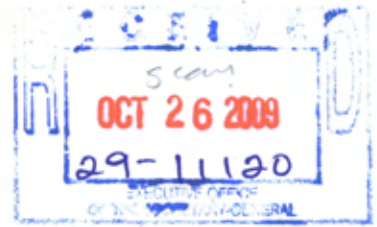


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Note to Mr. Nambiar

The first 100 days of UN Dispute Tribunal and UN Appeals Tribunal ✓

Please find attached for your information a note on the above matter, as well as an Annex ✓
summarizing select cases.

Patricia O'Brien
22 October 2009

cc: Mr. Kim
Ms. Kane
Ms. Pollard
Mr. Terekhov

The first 100 days of UN Dispute Tribunal and UN Appeals Tribunal

1. Established on 1 July 2009, the new administration of justice system reached its 100th day mark in October. As of 15 October 2009, the Dispute Tribunal in New York, Geneva and Nairobi issued 37 judgments and over 140 orders. The Appeals Tribunal is expected to convene its first session in spring 2010.

2. Of the 34¹ judgments of the Dispute Tribunal reviewed by OLA, four cases involve staff members of UNICEF, UNDP and UNFPA and the remaining cases involve UN Secretariat staff members. With regard to the subject matter of these judgments:

- 9 judgments reviewed requests for the suspension of the implementation of a contested administrative decision pending a management evaluation.
- 14 judgments reviewed procedural matters (e.g. receivability of the application, recusal of judges, motions to summarily dismiss a case, orders to produce documents).
- 11 judgments ruled on the merits in cases challenging, *inter alia*, summary dismissal, rescission of appointments, non-selection, non-promotion, non-renewal, and re-assignment. Of these 11 judgments, Dispute Tribunal ruled in favour of the Respondent in five cases.

3. Although it would be premature to draw conclusions about the Dispute Tribunal's jurisprudence, there are a number of issues that OLA is monitoring carefully. As some judges have relied on the jurisprudence of national courts, rather than that of the Administrative Tribunal, it will be important to ensure that certain fundamental principles that have been well-established in the jurisprudence of the Administrative Tribunal – e.g. the discretionary authority of the Secretary-General to administer staff members – will continue to be respected by the Dispute Tribunal. Also of concern are inconsistent approaches to judicial decision-making that are beginning to emerge. For example, in reviewing ST/AI/2006/3 on the “Staff selection system”, one Dispute Tribunal judge ruled against the Organization for not following the strict letter of one provision (Kasyanov), while another judge found that the Organization's failure to properly consider a request for an exception to another provision was “not lawful” (Hastings).

4. The new Appeals Tribunal will be able to review appeals of Dispute Tribunal judgments filed by either staff members or the Administration. To date, two appeals have been filed with the Appeals Tribunal. In Campos, the staff member challenged the Secretary-General's appointment of another staff member to the Internal Justice Council and has appealed the Dispute Tribunal's judgment in favour of the Respondent. In Tadonki, the Organization appealed the Dispute Tribunal's orders to suspend a contested administrative decision beyond the pendency of a management evaluation and to order the payment of salary; such orders, in our view, exceed the Dispute Tribunal's authority under its Statute.

5. OLA is cooperating closely with other offices representing the Organization before the Dispute Tribunal and has established a Coordination Task Force on the Administration of Justice to strengthen our capacity to meet the challenges of the new administration of justice system. The Coordination Task Force will have its first meeting in early November.

¹ Three judgments have not yet been made available.

Annex

Summary of select judgments issued by the Dispute Tribunal

UNDT Judgment No. 2009/22 (Kasyanov): Under ST/AI/2006/3 on the “Staff Selection System”, the Applicant was eligible to be considered at the 15-day mark but the Administration reviewed the 15-day and 30-day candidates together, and ultimately selected a 30-day candidate. The Dispute Tribunal noted the mandatory language used in formulating the Administration’s obligation to consider 15-day candidates used in ST/AI/2006/3 (“In considering candidates, programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark.”) and ruled that, in view of such language, the Administration must first evaluate 15-day candidates before it can consider any other candidates.

UNDT Judgment No. 2009/30 (Hastings): The Applicant was appointed at the P-5 level and received an SPA to the D-1 level; she applied for a position at the D-2 level. Under section 5.2 of ST/AI/2006/3 on the “Staff Selection System”, staff members may only apply to positions one level higher their current grade. The Applicant requested an exception pursuant to the staff rule 112.(b) which allows the Secretary-General to make exceptions to the staff rules, but was informed by OHRM that no exceptions to section 5.2 of ST/AI/2006/3 are permitted. The Dispute Tribunal considered that in view of the perfunctory nature of this response, the Applicant’s request for an exception was “not properly considered” and therefore the decision of the ASG/OHRM not to consider an exception for the Applicant was “not lawful.”

UNDT Judgment No. 2009/17 (Campos): The Applicant challenged the Secretary-General’s decision to appoint Jenny Clift as the representative of staff on the Internal Justice Council, a body established by the General Assembly to make recommendations for judicial appointments to the Dispute Tribunal and Appeals Tribunal. The Organization argued that this matter did not fall within the Dispute Tribunal’s jurisdiction. The Dispute Tribunal held that it had jurisdiction over this matter since the Applicant had a “right” to represent staff members, but it ultimately ruled in favor of the Organization since it determined that the Applicant failed to establish any flaws in the appointment of Ms. Clift. The Applicant has filed an appeal.

UNDT Judgment No. 2009/16 (Tadonki): In a case in which the Applicant filed a request for a management evaluation and had not yet filed an application before the Dispute Tribunal, the Dispute Tribunal ordered a suspension of the contested decision “pending the final determination of the substantive appeal” and the payment of half salary as an interim measure. The Respondent requested the Dispute Tribunal to interpret its judgment but also filed an appeal with the Appeals Tribunal in order to comply with the deadline for appeals. The Respondent noted that since the Dispute Tribunal may only order a suspension of a contested decision “during the pendency of a management evaluation,” the duration of such a suspension cannot exceed the date of the completion of the management evaluation. The Respondent also noted that the Dispute Tribunal can only order interim measures such as the payment of salary during proceedings, ie. once an application has been filed with the Dispute Tribunal, but in the present case, the Applicant has not filed an Application with the Dispute Tribunal. While orders for suspension and interim measures cannot be appealed, the Respondent maintains that the prohibitions on appeals of such decisions, as set out in Article 2(2) and 10(2) of the Dispute Tribunal’s Statute, do not apply since these orders were not made within the parameters of these articles.