



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

Judgment No. 2021-UNAT-1120

**Jose Daniel Arango
(Respondent)**

v.

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

JUDGMENT

Before: Judge John Raymond Murphy, Presiding
Judge Martha Halfeld
Judge Dimitrios Raikos

Case Nos.: 2020-1465

Date: 25 June 2021

Registrar: Weicheng Lin

Counsel for Appellant: Maryam Kamali

Counsel for Respondent: Evelyn W. Kamau, OSLA

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal by the Secretary-General against United Nations Dispute Tribunal (the UNDT or Dispute Tribunal) Judgment No. UNDT/2020/134, which granted Mr. Arango's application contesting his non-selection to a temporary appointment after having been recommended for the position, on grounds he was not medically cleared due to a medical record that had been placed in his Official Status File (OSF) over two years earlier. For reasons set forth herein, we grant the Secretary-General's appeal and vacate the impugned Judgment.

Facts and Procedure

2. The impugned Judgment held that the United Nations High Commissioner for Refugees (UNHCR) had failed to act fairly by not selecting the appellee, Mr. Jose Daniel Arango, for a temporary appointment as a Resettlement Officer at the P-3 level in Brasilia, Brazil.

3. The UNDT had issued two Judgments in the present matter. On 13 January 2020 it issued Judgment No. UNDT/2020/004 holding that Mr. Arango's application was receivable and that it had jurisdiction to determine the application. On 4 August 2020, it issued Judgment No. UNDT/2020/134, on the merits.

4. Mr. Arango joined the office of UNHCR in March 2014 as an Associate Protection Officer in Ethiopia at the P-2 level through the Entry-Level Humanitarian Program (EHP). His fixed-term appointment expired one year later on 14 March 2015, and he was separated from the service of UNHCR, as there were no suitable posts upon which he could be placed in order to extend his fixed-term appointment. He did not contest that decision.

5. More than two years later, on 4 July 2017, Mr. Arango was informed by the Policy Officer, Resettlement Service, Division of International Protection, UNHCR, that UNHCR had reviewed his application and was interested in retaining him on a temporary appointment as P-3 Resettlement Officer in Brasilia. Prior to that, in early June 2017, the UNHCR Representative in Brasilia had sent a request to the Division of Human Resources Management (DHRM) asking for a list of suitable candidates for the position. Due to the very specific requirements of the position, including the ability to communicate in Portuguese, Mr. Arango was informed that UNHCR was interested in

retaining him. Terms of Reference were shared with him, and he expressly confirmed his availability. The purpose of the proposed temporary appointment was to meet short-term staffing needs. No temporary position at that point existed, no job opening had been advertised, and no call for applications had been made.

6. Mr. Arango confirmed his availability and interest in the temporary appointment, at which point he was informed that the request to proceed with his candidacy had been sent to DHRM in Geneva. Internal correspondence indicates that Mr. Arango was initially considered favourably. On 5 July 2017, Ms. G of the UNHCR communicated to him that his candidacy had been discussed, UNHCR Brazil wished to retain him, and a request to proceed with his appointment had been forwarded to Geneva. However, no process of selection or appointment was formally concluded. However, on 26 July 2017, the Senior Recruitment Officer DHRM informed the UNHCR Representative that Mr. Arango had not been cleared for rehiring.

7. On 9 August 2017, the UNHCR Representative informed Mr. Arango that UNHCR was unable to select him for the position as it had received information from DHRM that he had “not been cleared by DHRM to be re-hired”. On 26 September 2017, Mr. Arango was told by the Legal Affairs Service, UNHCR that his non-clearance for eligibility for the temporary appointment in Brasilia related to a medical constraint that had been placed in his official status file prior to the expiry of his previous appointment in January 2015. The constraint limited his deployment to certain duty stations only. However, the evidence indicates that the constraint did not apply to Brasilia and thus in fact should have posed no impediment to his deployment.

8. On 7 October 2017, Mr. Arango sought management evaluation of the decision to exclude him from the recruitment exercise for the temporary appointment as P-3 Resettlement Officer in Brasilia and on 19 February 2018, he filed an application before the UNDT challenging the decision.

9. On 13 January 2020, the UNDT handed down its first Judgment No. UNDT/2020/004 in which it solely determined the issue of receivability or jurisdiction. Although the point is not clearly articulated in the UNDT’s first Judgment, it is clear that the Secretary-General maintained that the UNDT lacked jurisdiction in terms of Article 3 of the UNDT Statute because Mr. Arango was not a staff member, and although he had previously

worked for UNHCR for a short period was not a “former staff member” in the meaning contemplated in Article 3(1)(b) of the UNDT Statute. The UNDT in its first Judgment rejected that submission as follows:¹

16. The Respondent’s case is that since there had been no contractual relationship between the Applicant and UNHCR for more than two years, the Applicant has no standing to contest his non-selection for the temporary post in Brasilia. The Respondent asserts that the contested decision has no bearing on the Applicant’s former status as a staff member.

17. The Tribunal is in full agreement with the Applicant that the withdrawal of his candidature for the position in Brasilia was directly connected to the confidential medical status of 27 January 2015 compiled by the Medical Section Board (“MSB”) restricting duty stations the Applicant could work in at that time.

18. The issues relating to the recruitment policy and procedures of UNHCR raised by the Respondent in his reply are of no relevance at this point in the adjudication of this application. The UNHCR through its agents or staff resorted to a procedure that gave the Applicant a legitimate expectation of employment and he would have been employed based on the chosen mode of recruitment had it not been for the adverse and alleged misrepresentation of a confidential medical condition which was improperly taken into consideration without affording the Applicant an opportunity to be heard on it or indeed subjecting him to undergo a fresh medical examination as a pre-requisite in such recruitments.

19. To put the matters into perspective, in an email dated 5 July 2017, Ms. [G.] informed the Applicant, copying the UNHCR Representative for Brazil, [...], that he had been selected for the temporary P-3 Resettlement Officer post in Brasilia. Below is what was expressly communicated to the Applicant:

“Thank so much for your reply and for confirming your interest in the position. So that we are clear-we would like to retain for [sic] this position so considered [sic] yourself selected! The request to proceed with your candidacy has been sent to the relevant colleagues in human resources, and I understand you should be contacted shortly.”

20. Instead, on 9 August 2017, [the UNHCR Representative for Brazil] informed the Applicant that they were unable to select him for the position as they had received information from the UNHCR DHRM that he had not been cleared to be re-hired. On the same date, the Applicant requested [the UNHCR Representative for Brazil] to inform him of the reasons why he could not be re-hired. She informed him that the reasons had not been disclosed to her and that he should contact DHRM directly.

¹ *Arango v. Secretary-General of the United Nations*, Judgment No. UNDT/2002/004, paras. 16-22, citing to *Shkurtaj v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-148.

21. [The Appeals Tribunal] in *Shkurtaj* held that a former staff member had standing to contest an administrative decision concerning him or her if the facts giving rise to his or her complaint arose, partly arose, or flowed from his or her employment. The Tribunal also noted that there must be a sufficient nexus between the former employment and the impugned action.

22. The Tribunal finds that the facts in the present case are covered by the above cited jurisprudence and is bound to find that this Tribunal has jurisdiction to hear and determine this application on the merits.

10. The UNDT thus held that the application was receivable and held further that although Mr. Arango was a former staff member of UNHCR, the hiring procedure gave him a legitimate expectation of employment. It was, therefore, bound to hear and determine the application on its merits.

11. UNHCR did not immediately appeal against the UNDT's finding on receivability but instead opted to wait for the determination of the application on the merits. It was guided in this regard by the decision of this Tribunal in *Tadonki*, which held that only appeals against final judgments will be receivable.²

12. On 4 August 2020, the UNDT issued its Judgment on the merits of the case. As stated, it concluded that the UNHCR administration had failed to act fairly in not selecting Mr. Arango for the temporary appointment because it based its decision on the medical record without his consent or affording him an opportunity to comment on it. It held that the decision of UNHCR was unlawful and ordered Mr. Arango to be paid compensation equivalent to the full six months' earnings that he could have earned on the temporary appointment.

Submissions

Appeal of the Secretary-General

13. The Secretary-General submits that the UNDT erred in law as Mr. Arango did not have standing because at the time of the decision not to select him, he had been separated from service for more than two years and therefore was no longer a staff member. There must be a sufficient nexus between the former employment and the contested decision. A

² *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005, paras. 8-9.

sufficient nexus exists when a decision has bearing on an applicant's former status as a staff member, specifically when it affects his or her previous contractual rights.³

14. The Secretary-General also submits that the UNDT misapplied *Shkurtaj* to the facts. In *Shkurtaj*, the applicant, a whistleblower, had contested the decision not to enforce an ethics policy on retaliation protection which stemmed from his employment. In that case the contested decision was taken during his appointment. In the instant case Mr. Arango is contesting a hiring decision that occurred more than two years after his separation.

15. Moreover, Mr. Arango could have contested the insertion of the medical record in January 2015. He knew about his medical conditions relating to his prior separation and complained at that time about the accuracy of the information being maintained on file. It is now too late to challenge that determination and so it follows that the decision not to offer him a temporary appointment is not linked to his terms of appointment as a former staff member when he failed to challenge the medical status at that time.

16. This Tribunal has held in *Ross*⁴ and *Al Hallaj*⁵ that obligations to protect legitimate expectations arise from a quasi-contract. Mr. Arango did not have any legitimate expectations or a quasi-contract. No offer of appointment was issued and no other conditions for appointment were addressed in any communication to Mr. Arango with the result that no quasi-contract was concluded.

17. With regard to the merits, the Secretary-General maintains that the UNDT erred in law in its award of six months' compensation. Mr. Arango is required to prove harm supported by evidence. Mr. Arango did not suffer economic harm and he mitigated his loss with other employment. He also did not provide evidence of non-pecuniary harm or moral damages. Yet having suffered no moral or economic harm the UNDT awarded Mr. Arango six months' earnings which is tantamount to punitive damages.

³ *Sims v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-154; *Ghahremani v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-171; *Khan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-727.

⁴ *Ross v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1000.

⁵ *Al Hallaj v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-810.

Mr. Arango's Answer

18. The Secretary-General's appeal challenging receivability is time barred and must be rejected. The Judgment on Receivability was issued 13 January 2020 requiring the appeal on receivability to be filed within 60 days by 13 March 2020. The Secretary-General relied mistakenly on *Tadonki* and implies an appeal on receivability can only be brought as part of an appeal on final judgment.

19. *Shkurtaj* requires a nexus between the former employment and the impugned decision. It need not be facts occurring during the previous employment but facts arising or flowing from the previous employment. The 2015 MSB determination occurring during his employment and was cited as the very reason for the contested administrative decision in issue. This is a sufficient nexus.

20. Mr. Arango's selection created a quasi-contract giving him standing. Mr. Arango was informed of his selection and informed his candidature was forwarded to DHRM for finalization.

21. Had UNHCR not discriminated against him for his prior mental illness he would have been subjected to a new medical clearance per Staff Regulation 4.6 and Section 2 of ST/AI/2011/3 as well as UNHCR Policy-Inter Office Memorandum FOM 36/2010/Cor. 2 (Administration of Temporary Appointments) (Medical Policy) stating successful candidates undergo a medical evaluation after selection but prior to being appointed, for purposes of medical clearance.

22. The Appellant's argument that Mr. Arango should have challenged the contents of the medical record back in 2015 and because he didn't his application is not receivable is erroneous. Mr. Arango is not now seeking to dispute the contents of the 2015 medical record he disputed the "use" of that medical record determination to bar him from an appointment in 2017.

23. The UNDT correctly awarded compensation *in lieu* of rescission. The Secretary-General misinterprets the UNDT's reasoning as punitive damages. The Secretary-General conflated the right to compensation as a consequence of harm suffered with the duty to mitigate loss and with the UNDT's authority to order *in lieu* compensation alternative to rescission. The very purpose of compensation is to place the staff member in

the same position he would have been in had the Organization complied with its statutory obligations. That is what the UNDT did.

Considerations

24. Mr. Arango contends that the appeal against the question of receivability is time barred. In terms of the Appeals Tribunal's Statute Article 7(1)(c), and of Article 7(1)(a) and (b) of the Appeals Tribunal's Rules of Procedure, an appeal against a Judgment of the UNDT must be brought within 60 calendar days of receipt of the Judgment. Since the Judgment on Receivability was issued on 13 January 2020, he submits that any appeal on the question of receivability by the Secretary-General should have been filed by 13 March 2020. The Secretary-General chose not to appeal the Judgment within the prescribed time limits. Nor did he seek leave for a suspension, waiver or extension of the time limits, to file the appeal in terms of Article 7(2) of this Tribunal's Rules of Procedure. The Secretary-General's reliance on *Tadonki* to argue that an appeal on receivability can only be brought as part of an appeal on final judgment, it was argued, is incorrect. *Tadonki* involved an appeal against a suspension of action order, an interim measure, which is without appeal in terms of Article 10(2) of the UNDT Statute.

25. Mr. Arango's argument is unsustainable. It is a general principle in the law of appeals that interlocutory orders are not appealable. In a wide and general sense, the term "interlocutory" refers to all orders pronounced by a tribunal upon matters incidental to the main dispute, preparatory to, or during the progress of the litigation. An order is not an interlocutory order if it is such as to have a final and definitive effect on the main suit or irreparably anticipates or precludes some relief sought by either party. The mistaken assumption of jurisdiction by a tribunal does not have a final or definitive effect on the main suit, nor will it preclude dismissal on the merits and is thus indeed an interlocutory order of the kind contemplated in *Tadonki*. A mistaken refusal to accept or assume jurisdiction, on the other hand, is final and definitive and is immediately appealable.

26. Not permitting appeals against interlocutory orders serves the important function of avoiding piecemeal appeals. The Secretary-General was accordingly correct to bide his time and to await the outcome on the merits before determining whether an appeal was necessary. Moreover, and in any event, if this Tribunal is of the view that the UNDT lacked jurisdiction *ratione personae*, it may *sua sponte* dismiss the appeal and application as not receivable. It

is inconceivable that the Appeals Tribunal will uphold and confirm an order of the UNDT when the facts and law establish that the UNDT had no jurisdiction or power to make such an order. The appeal of the Secretary-General is thus, not time barred.

27. Article 3(1) of the UNDT Statute limits the jurisdiction *ratione personae* of the UNDT. In terms thereof, the UNDT shall be competent to hear and pass judgment on applications of staff members, former staff members or representatives of incapacitated or deceased staff members of the Organisation. The preliminary issue in this case is whether Mr. Arango is a staff member or former staff member of the Organisation as contemplated in Article 3(1) of the UNDT Statute.

28. Before a person may be regarded as a former staff member in terms of Article 3 there must be a sufficient nexus between the former employment and the contested decision. A sufficient nexus exists when a decision has bearing on an applicant's former status as a staff member, specifically when it affects his or her previous contractual rights.⁶ The extension of the jurisdiction to former, deceased and incapacitated staff members is intended to permit resolution of disputes concerning contractual rights acquired during previous employment by staff members whose contracts have expired. The limited jurisdiction in relation to persons implies that the UNDT ordinarily will not have authority to receive applications by *inter alia* job applicants alleging illegality, unfairness or discrimination in the recruitment process.

29. The UNDT erred in concluding that Mr. Arango was a former staff member for the purposes of founding jurisdiction over the instant application. At the time of the contested decision not to select him Mr. Arango had been separated from service for more than two years and was no longer a staff member in the strict sense. His possible appointment in Brazil did not arise from any entitlement connected with his earlier employment by the Organisation. He was not asserting any right acquired in terms of his previous contract of employment. He challenges (as an external candidate) a barrier to his re-employment which might have unfairly prevented his future appointment by the Organisation. As said, the

⁶ See *Sims v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-154; *Ghahremani v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-171; and *Khan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-727.

UNDT, except in one or two extraordinary cases, does not normally enjoy jurisdiction to hear and determine applications by job applicants.

30. Moreover, the UNDT misapplied *Shkurtaaj* to the facts. In *Shkurtaaj*, the applicant, a whistleblower, had contested the decision not to enforce an ethics policy on retaliation protection which stemmed from his employment. In that case, the contested decision was taken during his appointment. In the instant case, Mr. Arango challenges a hiring decision unrelated to his previous employment that occurred more than two years after his separation. The imposition of the medical constraint during his previous employment was a distinct decision of which Mr. Arango was aware at the time it was taken. He did not contest it at the time. It is true that the constraint was inapplicable to Brasilia and should not have posed an impediment to his re-employment. But still, the contested decision, which unfortunately incorrectly relied on the medical constraint, was not sufficiently related to his previous employment. It had no bearing on his former employment in the sense that it affected any contractual rights he had acquired under it. The contested decision affected his interests (not any existing right) and his aspiration to establish future contractual rights. There was accordingly no nexus between Mr. Arango's former employment, the rights acquired under that contract and the contested decision.

31. Likewise, Mr. Arango does not fall into the same category of former staff member as the applicant in *Ross*.⁷ The applicant in that case, a former staff member, was entitled and eligible to apply as an internal candidate in terms of the UNHCR Revised Policy and Procedures on Assignments which conferred a specific right to do so. No such right exists in this case. Mr. Arango was an external candidate.

32. Mr. Arango could be regarded as having standing, and his application receivable, if he could be deemed in terms of quasi-contract to be a staff member. This Tribunal held in *Ross* that legitimate expectations and the concomitant status of a staff member may arise from a quasi-contract. A person may access the internal justice system to challenge a decision stemming from a quasi-contract, which is constituted prior to formal appointment "when an offer of employment is unconditionally accepted by the person who fully satisfies the conditions specified within." A quasi-contract thus may well confer the status of staff member on a job applicant. However, a quasi-contract is only formed when an offer of

⁷ *Ross v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1000.

employment is made and the conditions specified in the offer are fulfilled. It was held in *Latimer*⁸ that a valid quasi-contract may be concluded where an offer of appointment is issued and the other material conditions for appointment are addressed or stipulated. Mr. Arango was not given a written offer of appointment and no other conditions were addressed in the informal exchange of emails with the administration. The e-mail of Ms. [G], while certainly giving rise to some expectation, did not specify the essential elements of the contract such as start date, duration, grade step, salary, etc. It also indicated clearly that the decision to appoint had not been finalized as it was still subject to other internal processes. Hence, that e-mail was insufficient to give rise to a legitimate expectation of employment or a quasi-contract rendering Mr. Arango a staff member in the circumstances. Mr. Arango was accordingly not a staff member.

33. In the result, Mr. Arango did not have standing and the UNDT lacked jurisdiction *ratione personae* to hear and determine his application. There is accordingly no need to address the merits of the application. The appeal must be dismissed for lack of jurisdiction.

⁸ *Latimer v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-901.

Judgment

34. The appeal is upheld and Judgment Nos. UNDT/2020/134 and UNDT/2020/004 are reversed and set aside.

Original and Authoritative Version: English

Dated this 25th day of June 2021.

(Signed)

Judge Murphy
Cape Town, South Africa

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 7th day of July 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar