



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/056

Judgment No.: UNDT/2019/095

Date: 23 June 2020

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ROSS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT
ON RECEIVABILITY**

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Bettina Gerber, UNOG

Background

1. The Applicant is a former staff member of the United Nations High Commissioner for Refugees (“UNHCR”). After several assignments with UNHCR in Sudan, Kenya and Morocco, he was separated from service on 31 March 2016.¹
2. The Applicant filed the present application with the United Nations Dispute Tribunal (“the Tribunal/UNDT”) on 1 August 2016, contesting the decision to appoint another candidate to the position of Legal Officer, at the P-4 level, in the Office of Human Resources Management (“OHRM”), Nairobi, job opening number 57267 (“JO 57267”). The application was filed within the statutory deadlines.
3. At the date of the issuance of JO 57267, as well as at the date of the filing of the present application, the Applicant had been separated from service. He was, however, contesting the non-renewal of his appointment and separation decision in Case No. UNDT/NBI/2016/054 before this Tribunal.²
4. The Respondent filed a reply to the 1 August 2016 application on 2 September 2016 in which he asserted that the present application is not receivable *ratione personae* because at the date of the filing of the present application the Applicant was not a staff member of UNHCR and the contested decision had no bearing on the Applicant’s status as a former staff member or otherwise breached the terms of his former appointment.
5. In accordance with Order No. 179 (NBI/2017), the Applicant filed a rejoinder to the reply on 9 November 2017. The Respondent filed additional comments on receivability on 5 February 2019.
6. Whereas the Applicant requested suspension of proceedings pending the issuance of a judgment in Case No. UNDT/NBI/2016/054,³ the Respondent maintained

¹ Judgment No. UNDT/2019/126.

² Application, p. 5, para. 1; para. 3 of Order No. 010 (NBI/2019) dated 7 February 2019.

³ Ibid.

that the application was not receivable and objected to the suspension of proceedings arguing that there is no causal link between the two cases.⁴

7. On 7 February 2019, the Tribunal issued Order No. 010 (NBI/2019) where it deliberated on two issues: (i) whether appealing a decision on separation has a suspensive effect on cessation of staff member's rights with respect to access to UNDT; and (ii) whether an applicant, who is successful against a decision on separation from service, regains access to UNDT in relation to other decisions which had been challenged pending the dispute about his/her staff member's status. The Tribunal concluded that resolving the question of the Applicant's staff member's status in Case No. UNDT/NBI/2016/054 was a necessary predicate for the question of receivability of the present application. Accordingly, the proceedings were suspended pending the outcome in Case No. UNDT/NBI/2016/054

8. Case No. UNDT/NBI/2016/054 was found to be without merit and dismissed by the Tribunal on 10 July 2019 by Judgment No. UNDT/2019/126. The Applicant's appeal of the separation decision in Judgment No. UNDT/2019/126 was dismissed by the United Nations Appeals Tribunal ("the Appeals Tribunal/UNAT") by way of Judgment No. 2020-UNAT-1000 which was published on 19 June 2020.

Submissions

Respondent's case

9. The application is not receivable *ratione personae* for the following reasons:
- a. The Applicant was not a staff member of the Organization at the time he applied for the position.
 - b. Pursuant to articles 2.1 and 3.1 of the UNDT Statute, a former staff member may only challenge an administrative decision related to the terms of his or her former appointment. Relying on *Buckley* UNDT/2011/128, the Respondent asserts that a former staff member may not challenge a non-

⁴ Respondent's additional submissions of 5 February 2019, para. 16.

selection decision concerning a position for which he or she applied after his separation from the Organization. The Applicant has failed to establish a sufficient nexus between his former employment with UNHCR and the impugned decision especially since UNHCR was not involved in the decision-making process.⁵

c. The fact that the Applicant alleges in other proceedings before the Tribunal that his separation from UNHCR on 31 March 2016 was the result of an unlawful decision is irrelevant. The potential outcome of those separate proceedings is unknown. Further, the Tribunal may not find in his favour or may not order rescission if he is successful and UNHCR may elect to pay in compensation as an alternative to rescission under art. 10.5(a) of the UNDT Statute.

d. While the Applicant remained an internal candidate for UNHCR positions for two years (until March 2018), this has no relevance for the question of receivability in the present case because the contested selection decision did not concern a position with UNHCR but rather with the United Nations Secretariat.

Applicant's case

10. The application is receivable for the following reasons:

a. There is a strong nexus between the Applicant's former employment with UNHCR and his non-selection for JO 57267 because his rights in the selection process were violated by disregarding a conflict of interest on the part of a panel member; and the Applicant continued to be an internal candidate for positions at UNHCR for two years after his separation.

b. UNHCR's decision to separate him on 31 March 2016 was null and void. Once the UNDT has decided on the illegality of the separation in Case

⁵ *Shkurtaj* 2011-UNAT-148.

UNDT/NBI/2016/054, he is to be considered as if he is still a staff member of the United Nations at the time of the selection process for JO 57267. UNDT's decision regarding the legality of the separation is therefore a precondition for the case at hand.

c. Whether UNHCR reinstates him or not after UNDT's decision on his separation will not impact the receivability of the current application. The only thing that matters for the receivability of the case at hand is the fact that he would have still been a staff member at the time of the selection process if UNHCR had not illegally separated him. The Applicant urges the Tribunal to interpret its jurisdiction broadly to ensure the Applicant is not deprived of access to a judicial remedy

Considerations

11. In considering whether the Applicant has the required *locus standi* to appear before it, the Tribunal recalls the pertinent provisions of the UNDT Statute. Article 2.1 of the UNDT Statute provides:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute ... [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

12. Articles 3.1(a), (b) and (c) of the UNDT Statute state:

Article 3

1. An application under article 2, paragraph 1, of the present statute may be filed by:

(a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

13. Pursuant to these provisions, a necessary condition for the exercise of the jurisdiction of the Tribunal is that the impugned decision concerns the terms of appointment or the contract of employment such as it stood at the time when the applicant was a staff member. This position has been confirmed by the UNAT, e.g., in *Hersh*⁶, where the Appeals Tribunal confirmed that a former staff member may challenge a decision to terminate his or her appointment and in *Hepworth*⁷, where it held that a former staff member may contest a decision not to renew their appointment, as such decisions relate to the terms of the staff member's former appointment. By the same token, a former staff member has *locus standi* regarding decisions on his/her pension, as derivative of the employment relation.

14. Conversely, the status of a former staff member *per se* does not grant access to the Tribunal regarding administrative decisions which occur outside the framework of the former employment relation between a staff member and the Organization, such as is pertinent to a new employment relation which does not involve a staff member status (official other than staff, consultant). These remain outside the Tribunal's jurisdiction. The Appeals Tribunal confirmed in *Khan*⁸ that pursuant to arts. 2.1 and 3.1(a) of the UNDT Statute, a former staff member or contractor of the Organization has access to the Dispute Tribunal only in respect to an administrative decision impacting the terms of his or her former appointment or contract:

In *Ghahremani*, we held that a former staff member of the Organization who brings an application which does not complain that the contested decision was not in compliance with his terms of appointment or contract of employment does not have standing as the application has

⁶ 2014-UNAT-433.

⁷ 2015-UNAT-503.

⁸ *Khan* 2017-UNAT-727, para. 28, citing to *Ghahremani* 2011-UNAT-171.

no bearing on the individual's former status as a staff member; thus, the application was not receivable *ratione personae*. In other words, the contested decision could not have adversely affected the individual's terms of appointment as a former staff member.

15. Similarly, access to the Tribunal does not extend over decisions taken prior to the formation of employment relation with a staff member⁹, specifically over challenges of the selection procedure. There is established jurisprudence of UNAT that the jurisdiction of both Tribunals is to be interpreted narrowly¹⁰ and that both UNDT and UNAT were established by the General Assembly as internal justice institutions¹¹, thus serving the needs of existing staff. Their jurisdiction does not extend over potential claims of hundreds of applicants who apply for every United Nations vacant position, including former staff members such as may be among them. On this point, the Dispute Tribunal held in *Buckley* that a former staff member may not challenge a non-selection decision regarding a position for which he or she had applied after his or her separation from the Organization, as such a decision does not violate the staff member's former terms of appointment.¹² This Tribunal endorses this position.

16. In the present case, the principal holding articulated in the two preceding paragraphs is not disputed. Rather, the matter is about whether a staff member who effectively contested before the UNDT a decision to separate him/her from service remains a "staff member" for the purpose of appealing before the UNDT decisions concerning legal relations occurring after the separation from service. Absent a specific provision to address this situation, two systemic issues become relevant for this determination. First, whether appealing a decision on separation has a suspensive effect on cessation of staff member's rights, specifically the right to access the UNDT. Second, whether an applicant who is successful against a decision on separation from service regains access to UNDT in relation to other decisions which had been

⁹ With the exception being the formation of a contractual relationship after a candidate has accepted an offer of appointment (see *Gabaldon* 2011-UNAT-120 and *Trudi* UNDT/2015/049).

¹⁰ *Ndjadi* 2012-UNAT-197, para. 2; *Sims* 2011-UNAT-154, para. 14; *Warintarawat* 2012-UNAT-208, para. 10; *Chocobar* 2014-UNAT-488, para. 16.

¹¹ Paragraph 4 of A/RES/61/261 (Administration of justice at the United Nations), adopted on 4 April 2007.

¹² *Buckley* UNDT-2011-128 (not appealed).

challenged pending the dispute about his/her staff member's status.

17. With respect to the first issue, it is clear from the rules governing the proceedings before the UNDT that the filing of an application before the UNDT does not have suspensive effect on the contested administrative decision.¹³ Such suspensive effect may only be attained through a motion for suspension of action under art. 2.2 of the UNDT Statute, where suspension is limited to the period of management evaluation, or under art. 10.2, pending proceedings before the UNDT; in the latter case, however, the UNDT Statute specifically excludes from the realm of this article the decisions on appointment, promotion or termination. The Appeals Tribunal has endorsed the plain meaning rule of interpretation¹⁴, therefore, interpreting further exceptions is not *prima facie* allowed. The Applicant has also never filed an application for suspension of action in relation to this case. As such, the Applicant's staff member status was not extended by virtue of his appeal against the separation from service in Case No. UNDT/NBI/2016/054.

18. The second issue, whether the staff member's status revives by virtue of a judgment in favour of rescission of a separation decision, breeds two questions. First, whether the status would be revived *ab initio*, and thus extend over the *locus standi* in disputes that have issued during pendency of the determination of the status. Second, what is the impact of the Respondent's electing to not restore the applicant's status as staff and opt for a pay-off.¹⁵

19. With respect to the first question, whereas the Applicant avers that the separation decision is "null and void", it is noted that the applicable legal framework does not recognize an *ex lege* nullity of an administrative decision. A successful application before the Tribunal may only produce a constitutive judgment mandating the rescission of the impugned decision. Lack of any instance ever of actually restoring a successful applicant in the position previously held has left largely unexplored the question which consequences of the rescission of a decision on separation would have

¹³ Article 8.5 of the UNDT Statute.

¹⁴ see, e.g., *Scott* 2012-UNAT-225, *De Aguirre* 2016-UNAT-705, and *Timothy* 2018-UNAT-847.

¹⁵ Article 10.5(a) of the UNDT Statute.

ex tunc or *ex nunc* effect. Here, a guiding principle however, must be that of an effective remedy, confirmed by the Appeals Tribunal:

In general, in keeping with the principle of the right to an effective remedy enshrined in article 8 of the Universal Declaration of Human Rights, the rescission of the illegal decision to dismiss a staff member implies, for the Administration, that it must both reinstate the staff member and pay compensation for loss of salaries and entitlements not related to actual service performance after deducting any salaries and entitlements that the staff member received during the period considered. The option given to the Administration, on the basis of article 10(5)(a) of the Statute of the Dispute Tribunal, to pay compensation in lieu of performance of a specific obligation such as reinstatement, combined with the cap fixed in article 10(5)(b), should not render ineffective the right to fair and equitable damages, which is an element of the right to an effective remedy.¹⁶

20. Accordingly, the restoration of a staff member's status, wherever possible, should be *ex tunc*. Among other, the applicant would also retroactively be restored in his *ratio personae* access to the Dispute Tribunal.

21. Does this proposition become modified by the Respondent's electing the pay-off option? The Tribunal understands the rationale for this option lies in challenges posed by restoring an applicant in the previous position, especially after a passage of time. The post may have been filled or abolished, even the whole field office or a mission closed. These considerations, while they objectively favour the pay-off, they, however, do not justify limiting the "effective remedy" even further. There is no legitimate interest of third persons or an overriding interest of the Organization – other than mere convenience - in denying the successful applicant restitution of a small

¹⁶ *Cohen* 2011-UNAT-131. On the universality of effective remedy principle see also UN Administrative Tribunal Judgment 1225 (2005) citing to the seminal ICJ Judgment in the Case concerning the factory at Chorzów (Merits), 1928, P.C.I.J., Series A, No. 17, p. 47: " This general principle establishing the parameters of the obligations arising from a finding of responsibility on the part of a subject of law was perfectly expressed in a well-known dictum of the Permanent Court of International Justice: *The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.*

component of his status which is access to the UNDT. The Tribunal holds, therefore, that following a rescission of a decision on separation from service, an applicant's access to UNDT is revived in relation to cases brought during the pendency of the dispute over the separation decision.

22. Based on the aforesaid, the Tribunal could not assert or refuse jurisdiction over the Applicant's current claim until the challenge of his separation from service from UNHCR was resolved by a final judgment.

23. Given that the Applicant's separation has now been confirmed by the UNDT and the UNAT, the conclusion for this case is that the Applicant applied for JO 57267 as a former staff member, and in the same capacity he filed his challenge to the non-selection decision for JO 57267. The Tribunal agrees with the Respondent as to the lack of nexus between the Applicant's former employment with UNHCR and his standing as applicant for JO 57267. The alleged fact that UNHCR in their recruitment processes would be applying a legal fiction of treating former staff members as internal applicants for a period of time, does not create a nexus extending over any other recruitment processes, such as the contested one. In conclusion, the Applicant may not challenge his non-selection decision for JO 57267 as the impugned decision does not violate his former terms of appointment.

Judgment

24. The proceedings are resumed, and the application is **REJECTED AS IRRECEIVABLE**.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 23rd day of June 2020

Entered in the Register on this this 23rd day of June 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi