



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/056  
Order No.: 010 (NBI/2019)  
Date: 7 February 2019  
Original: English

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**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

ROSS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON SUSPENSION OF  
PROCEEDINGS**

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**Counsel for the Applicant:**  
Self-represented

**Counsel for the Respondent:**  
Bettina Gerber, UNOG

## **Introduction**

1. The Applicant is a former Senior Protection Officer with the United Nations High Commissioner for Refugees (UNHCR).

2. In this application dated 1 August July 2016, he is contesting the decision to appoint another candidate to the position of Legal Officer, P4, Office of Human Resources Management, Nairobi, job opening 57267.

3. Earlier, on 30 July 2016, the Applicant had filed an application contesting the decision to separate him from service and not renew his fixed-term appointment with UNHCR on 31 March 2016. That case is registered as Case No. UNDT/NBI/2016/054 and is currently pending before another Judge of the UNDT.

4. The Respondent filed a reply on 2 September 2016 in which it was argued, that the 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. The Tribunal held a case management discussion on 24 October 2017, following which the parties exchanged comments on the question of receivability. The Applicant filed his submissions on 9 November 2017 and the Respondent filed his on 5 February 2019. Whereas the Applicant requested suspension of proceedings pending the issuance of a judgment in Case No. UNDT/NBI/2016/054, the Respondent maintains that the application is not receivable and objects to the suspension of proceedings arguing that there is no causal link between the two cases.

## Deliberations

### *The question of nexus between cases*

6. Pursuant to arts. 2.1 and 3.1(a), (b) and (c) of the UNDT Statute, a necessary condition for the exercise of the jurisdiction of the Tribunal is that the impugned decision concern the terms of appointment or the contract of employment such as stood at the time of the alleged non-compliance, when the applicant was a staff member. These provisions have been interpreted by the United Nations Appeals Tribunal (the Appeals Tribunal) *inter alia* in *Hersh*<sup>1</sup>, where the Appeals Tribunal confirmed that a former staff member may challenge a decision to terminate his or her appointment, and in *Hepworth*<sup>2</sup> where it held that a former staff member may contest a decision not to renew his or her appointment as such decisions relate to the terms of the staff member's former appointment.

7. Conversely, administrative decisions which occur outside the legal relation between a staff member and the Organization remain outside the Tribunal's jurisdiction. The Appeals Tribunal confirmed in *Khan* 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 of an administrative decision affecting 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 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.<sup>3</sup>

8. Moreover, specifically in relation to challenges of the selection procedure, the Dispute Tribunal held in *Buckley* (not appealed) that a former staff member may not

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<sup>1</sup> 2014-UNAT-433.

<sup>2</sup> 2015-UNAT-503.

<sup>3</sup> *Khan* 2017-UNAT-727, para. 28, citing to *Ghahremani* 2011-UNAT-171.

challenge a non-selection decision for a position he or she had applied for after his or her separation from the Organization, as such a decision does not violate the staff member's former terms of appointment.<sup>4</sup> In both cases the applicants had been separated from the Organization based on final administrative decisions.

9. 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 challenged before the UNDT a decision to separate him/her from service may be considered "staff member" for the purpose of appealing before the UNDT decisions concerning legal relations occurring after the decision on separation from service. Absent a specific provision to address this situation, two systemic issues are relevant for the determination. First, whether appealing a decision on separation has a suspensive effect on cessation of staff member's rights, specifically the right to access to 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 challenged pending the dispute about his/her staff member's status.

10. With respect to the first issue, it is clear upon 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.<sup>5</sup> 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 interpretation<sup>6</sup>, therefore, interpreting further exceptions is not *prima facie* allowed.

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<sup>4</sup> Buckley UNDT-2011-128.

<sup>5</sup> Article 8.5 of the UNDT Statute.

<sup>6</sup> see, e.g., Scott 2012-UNAT-225, De Aguirre 2016-UNAT-705, and Timothy 2018-UNAT-847.

11. With respect to the second issue, whereas the Applicant avers that the separation decision is “null and void”, 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 on rescission of the impugned decision, and, even then, the Respondent has no obligation to restore the applicant’s status as staff and may elect the pay-off option.<sup>7</sup> Lack of any instance ever of actually restoring a successful applicant in the position that she or he previously held has left largely unexplored the question which consequences of the rescission of a decision on separation would have *ex tunc* or *ex nunc* effect. A guiding principle here, however, is that of 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.<sup>8</sup>

12. 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.

13. Does this proposition become modified by the Respondent’s electing the pay-off option? The Tribunal understands the rationale for this option being in the 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,

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<sup>7</sup> Article 10.5(a) of the UNDT Statute.

<sup>8</sup> *Cohen* 2011-UNAT-131.

they however do not justify limiting the remedy even further. There is no legitimate interest of third persons or overriding interest of the Organization – other than mere convenience - in denying the successful applicant restitution of a small 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, the applicant's access to UNDT is revived in relation to cases brought during the pendency of the dispute over the separation decision.

14. As such, the question of receivability in the present case is dependent on the outcome of UNDT/NBI/2016/054.

*Authority to suspend proceedings*

15. Article 10.1 of the UNDT Statute provides that the Dispute Tribunal may suspend proceedings in a case at the request of the parties for a time to be specified by it in writing. The Tribunal interprets this article as authorisation to suspend proceedings without showing any legally valid cause other than the parties' request. Neither the Statute nor the Rules of Procedure make provision for a situation, such as the present, where the resolution of a case would be predicated upon the outcome of another pending case, and only one of the parties has requested and the other has objected to the suspension.

16. Article 19 of the UNDT Rules of Procedure stipulates that the Dispute Tribunal may at any time, either on an 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.

17. Article 36.1 of the UNDT Rules of Procedure stipulates that

All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute.

18. In the present case, reading the above cited provisions together and having considered the parties' submissions on this issue, the Tribunal considers it in the interests of justice and judicial economy to suspend the proceedings in this case pending the outcome of Case No. UNDT/NBI/2016/054.

**IT IS ACCORDINGLY ORDERED**

19. The proceedings in this case are hereby suspended pending the outcome, including the outcome of a potential appeal, of Case No. UNDT/NBI/2016/054.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 7<sup>th</sup> day of February 2019

Entered in the Register on this 7<sup>th</sup> day of February 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi