

Background

1. The Applicant is a former staff member of the United Nations High Commissioner for Refugees (“UNHCR”). After several assignments with UNHCR in

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

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

Case No.: UNDT/NBI/2016/056
Judgment No.: UNDT/2020/095

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

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 member, specifically over challenges of the selection procedure. There is established jurisprudence of UNAT that the jurisdiction of both Tribunals is to be interpreted narrowly and that both UNDT and UNAT were established by the General Assembly as internal justice institutions 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. 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).

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.

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

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(Signed)

Abena Kwakye-Berko, Registrar, Nairobi