
UNITED NATIONS DISPUTE TRIBUNAL

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

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ROSS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON SUSPENSION OF
PROCEEDINGS**

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.

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.⁷ 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.⁸

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,

⁷ Article 10.5(a) of the UNDT Statute.

⁸ *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

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