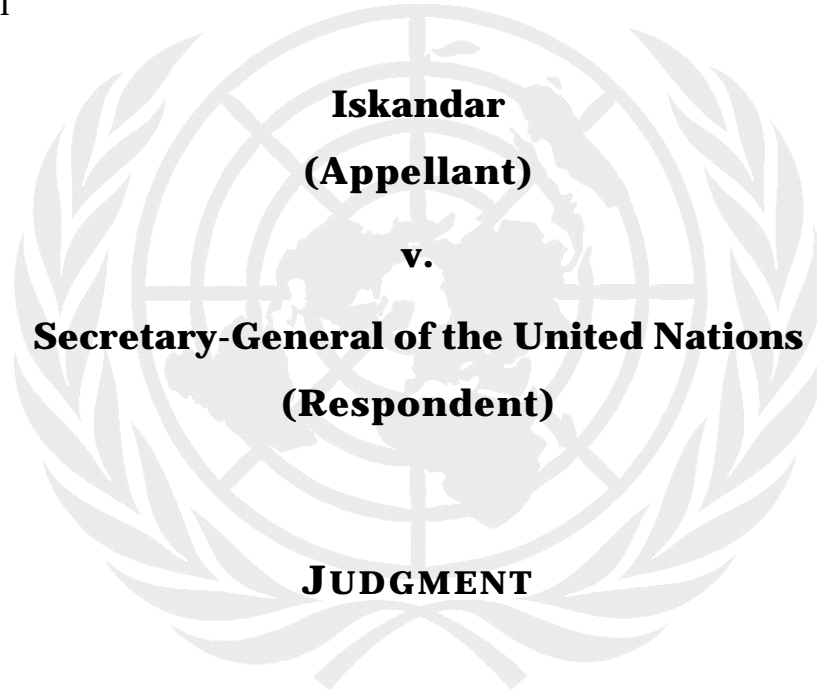




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-111



**Iskandar
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Jean Courtial Judge Luis María Simón
Judgment No.:	2011-UNAT-116
Date:	11 March 2011
Registrar:	Weicheng Lin

Counsel for Appellant: Muhammad Mohi-us Sunnah

Counsel for Respondent: Amy Wood

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. In this case, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found that Abdul Aziz Iskandar (Iskandar), a staff member of the World Food Programme (WFP) who served with the African Union/United Nations Hybrid operation in Darfur (UNAMID) under a reimbursable loan agreement, did not have legal standing to challenge the decision of UNAMID not to appoint him to a post.

2. As a consequence of the reimbursable loan agreement between WFP and UNAMID, the United Nations undertook to extend the protection of its system of administration of justice to Iskandar in respect of the administrative decisions taken by UNAMID during the term of the loan. Without access to the Dispute Tribunal, Iskandar would have no right to an effective remedy from the competent tribunal in respect of the administrative decisions taken by UNAMID. This would be a denial of justice. The Dispute Tribunal erred on a question of law in finding that Iskandar did not have standing to contest the administrative decision of UNAMID. The appeal is allowed, and the case is remanded to the Dispute Tribunal for a hearing on the merits.

Facts and Procedure

3. Iskandar was a staff member of WFP at the P-5 level. From June 2008 to January 2010, Iskandar was loaned to UNAMID under a reimbursable loan agreement (Loan Agreement). The terms of the Loan Agreement were governed by the Inter-Organization Agreement Concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances (Inter-Organization Agreement).

4. Under the Loan Agreement, Iskandar continued to be employed by WFP and retained specific return rights to WFP. UNAMID agreed to reimburse WFP for all the expenses incurred in connection with the Loan Agreement, including Iskandar's salary, benefits and allowances at his current P-5, step XI grade level.

5. Iskandar assumed his functions as Principal Officer at UNAMID on 3 June 2008. His title was subsequently changed to "Deputy Director" due to operational considerations.

The original term of the Loan Agreement was three months, as from 3 June 2008. The Loan Agreement was extended twice, first for a period of two months to 3 November 2008 and subsequently until late January 2010. There was dispute between WFP, UNAMID and Iskandar regarding the precise terms of the Loan Agreement for the second and final extension. However, the parties do not dispute that Iskandar remained on loan from WFP to UNAMID until his retirement in late January 2010.

6. In February 2009, Iskandar was interviewed for the post of Deputy Director, Khartoum Liaison Office, UNAMID, at the D-1 level. By memorandum dated 8 March 2009, the Director of Mission Support, UNAMID, informed the Acting Chief Civilian Personnel Officer, UNAMID, that Iskandar had been selected for the position of Deputy Director.

7. Iskandar did not receive a letter of appointment for the post of Deputy Director. On 8 June 2009, the Acting Chief Civilian Personnel Officer, UNAMID, sent an e-mail to Iskandar informing him that he was still a staff member of WFP on loan to UNAMID and advised him, therefore, that there was no need for a letter of appointment to be issued to him. Further, Iskandar could be considered for a UNAMID appointment and, if selected, given a letter of appointment if he resigned from WFP.

8. On 5 November 2009, Iskandar requested a management evaluation and sought either a transfer from WFP to UNAMID as Principal Officer or an official letter from UNAMID to WFP requesting that WFP remunerate him as Principal Officer at the D-1 level. The management evaluation, dated 18 December 2009, upheld the decision not to appoint Iskandar as Deputy Director, UNAMID, Khartoum Liaison Office, at the D-1 level.

9. Iskandar retired as a staff member of WFP on 26 January 2010 and he filed an application before the UNDT on 15 March 2010.

10. The UNDT rendered Judgment No. UNDT/2010/100, which rejected the application on the ground that the UNDT was not competent to hear the application. The Dispute Tribunal observed that Iskandar appeared to contest two decisions: the first was WFP's decision not to treat him as a staff member at the D-1 level while he was on loan from WFP to UNAMID; and the second was the decision of UNAMID not to appoint him to the post of Deputy Director, Khartoum Liaison Office.

11. With respect to the first contested decision, the Dispute Tribunal found that, under the Inter-Organization Agreement, Iskandar did not have any contractual relationship with UNAMID although he was under its administrative supervision, and that he continued to be subject to the Staff Regulations and Rules of WFP and retained his contractual rights with WFP. As UNAMID was not in a position to take a decision affecting Iskandar's contractual status, he could only contest an administrative decision affecting his terms of appointment before the appropriate appeals body established by WFP, the Administrative Tribunal of the International Labour Organization (ILOAT). For these reasons, the Dispute Tribunal found that it did not have jurisdiction to review the decision taken by WFP.

12. With respect to the second contested decision, the Dispute Tribunal observed that Iskandar took part in the selection process for the post of Deputy Director as a WFP staff member. The Dispute Tribunal found that, under Article 3(1)(a) of the Statute of the Dispute Tribunal (UNDT Statute), Iskandar did not have standing *ratione personae* to contest UNAMID's decision not to offer him an appointment. WFP is not a separately administered United Nations programme within the meaning of Article 3(1)(a) of the UNDT Statute. Iskandar could not allege non-compliance with his contract of employment because such a contract only existed with WFP, which does not recognize the jurisdiction of the Dispute Tribunal.

13. Iskandar filed an appeal against the Judgment with the Appeals Tribunal on 8 July 2010. The Secretary-General filed an answer to the appeal on 23 August 2010.

Submissions

Iskandar's Appeal

14. Iskandar's appeal against the Judgment concerns the decision of the Dispute Tribunal that it does not have jurisdiction to review UNAMID's decision not to appoint him to the post of Deputy Director in the Khartoum Liaison Office. Iskandar argues that the UNDT failed to exercise jurisdiction vested in it and erred on a question of law.

15. Iskandar submits that he was under the administrative supervision of UNAMID and was aggrieved by an administrative decision of UNAMID. Under paragraph 11 of the Inter-Organization Agreement, he is entitled to have recourse to the Dispute Tribunal as it is "the appropriate appeals body of the organization which took the decision appealed against".

The Dispute Tribunal's interpretation of Article 3(1) of the UNDT Statute and paragraph 11 of the Agreement effectively deprives him of the only forum of recourse for his grievance. Iskandar submits that this could not have been the intent of the General Assembly in adopting Article 3(1) of the UNDT Statute.

16. Iskander notes that the Secretary-General's response to his request for management evaluation considered the request on the merits and did not reject his request on the grounds of receivability.

17. Iskandar requests that the Appeals Tribunal reverse the Judgment and remand the case to the Dispute Tribunal for a trial on the merits.

Secretary-General's Answer

18. The Secretary-General submits that the Dispute Tribunal correctly concluded that it does not have jurisdiction *ratione personae* with respect to the decision by UNAMID not to appoint Iskandar to the post of Deputy Director. WFP is an autonomous joint subsidiary programme of the United Nations and the Food and Agriculture Organization of the United Nations (FAO), and WFP has accepted the jurisdiction of ILOAT with respect to its internationally recruited staff. As a retired WFP staff member, appointed under the FAO Staff Regulations and Rules, Iskandar did not have legal standing before the Dispute Tribunal to challenge the decision by UNAMID not to appoint him.

19. The Secretary-General contends that Iskandar's argument that the effect of the Judgment is that he is deprived of a forum in which to contest the decision of UNAMID fails to raise any error of law by the Dispute Tribunal. The Dispute Tribunal has consistently upheld the principle that its jurisdiction does not extend to persons who have not acquired the status of staff members.

20. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

21. This appeal concerns the issue of whether the UNDT has jurisdiction to review UNAMID's decision not to appoint Iskandar to the post of Deputy Director. The issue at

hand is whether the UNDT erred on a question of law in finding that Iskandar did not have standing *ratione personae* to challenge the decision of UNAMID under Article 3(1)(a) of the UNDT Statute. The UNDT concluded that Iskandar did not have standing as he was a staff member of WFP and did not have a contractual relationship with UNAMID.

22. In the impugned Judgment, the UNDT correctly referred to Articles 2 and 3 of its Statute. Article 2(1) reads: “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, ... (a) To appeal and administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”. Article 3(1) provides, in part, as follows:

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;

...

23. On the one hand, the UNDT was right to stress that the jurisdiction of the UNDT is limited to persons having acquired the status of staff members of the United Nations or former staff members, as set out in Article 3(1) of the UNDT Statute. At the time of filing his application, Iskandar was a former staff member of WFP, having retired in January 2010. WFP recognizes the jurisdiction of ILOAT to hear appeals against administrative decisions by WFP’s internationally recruited staff members.

24. However, it is necessary to examine whether the United Nations, through its conduct, has extended the protection of its internal law and, therefore, its system of administration of justice to Iskandar.

25. Iskandar was working at UNAMID under a Loan Agreement between WFP and UNAMID. Under the Loan Agreement, Iskandar continued to be employed by WFP and was subject to the administrative supervision of UNAMID.

26. The Loan Agreement was concluded within the framework of the Inter-Organization Agreement. Paragraph 10(a) of the Inter-Organization Agreement provides that “[w]hen a staff member is loaned, he will be under the administrative supervision of the receiving

organization, but will have no contractual relationship with it, continuing to be subject to the staff regulations and rules of, and retaining his contractual rights with, the releasing organization”.

27. The Inter-Organization Agreement also addresses the matter of appeals against administrative decisions by staff members on loan to another organization. Paragraph 11 provides as follows: “Appeals against administrative decisions taken before or after a transfer, or during a period of secondment or loan, will be heard by the appropriate appeals body of the organization which took the decision appealed against, and be dealt with under the regulations and rules of that organization.”

28. As a consequence of paragraph 11 of the Inter-Organization Agreement, the United Nations, through UNAMID, undertook to extend the protection of its system of administration of justice to Iskandar in respect of administrative decisions taken by UNAMID during the term of the Loan Agreement. The effect of this paragraph is that Iskandar cannot appeal against the administrative decisions of UNAMID before ILOAT; he can only appeal against the administrative decisions of WFP before ILOAT. Without access to the administration of justice system within the United Nations, Iskandar would have no right to an effective remedy from the competent tribunal in respect of administrative decisions taken by UNAMID. This would be a denial of justice.

29. It follows from the above that the UNDT erred on a question of law in finding that Iskandar did not have standing to contest the administrative decision of UNAMID before the UNDT.

30. This Tribunal decides to remand the case to the first instance Tribunal for determination of Iskandar’s application in respect of the contested decision by UNAMID.

31. In light of the foregoing, this Tribunal does not examine the issue of whether the UNDT erred on a question of law in finding that Iskandar, who did not receive a letter of appointment signed by an authorized official, could not be regarded as a staff member of the United Nations within the meaning of Article 3(1) of the UNDT Statute. The principles set out in this Tribunal’s Judgment in *Gabaldon*¹ are relevant to this issue. The facts of this case

¹ *Gabaldon v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-120.

are different, but the existence of a contract of employment may be inferred from the conduct of the parties, that is, before a formal contract of employment under the internal law of the United Nations has been concluded through the issuance of a letter of appointment.

Judgment

32. For the foregoing reasons, the appeal is allowed and the Judgment is vacated. The case is remanded to the Dispute Tribunal for a hearing on the merits.

Original and Authoritative Version: English

Dated this 11th day of March 2011 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Courtial

(Signed)

Judge Simón

Entered in the Register on this 19th day of April 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar