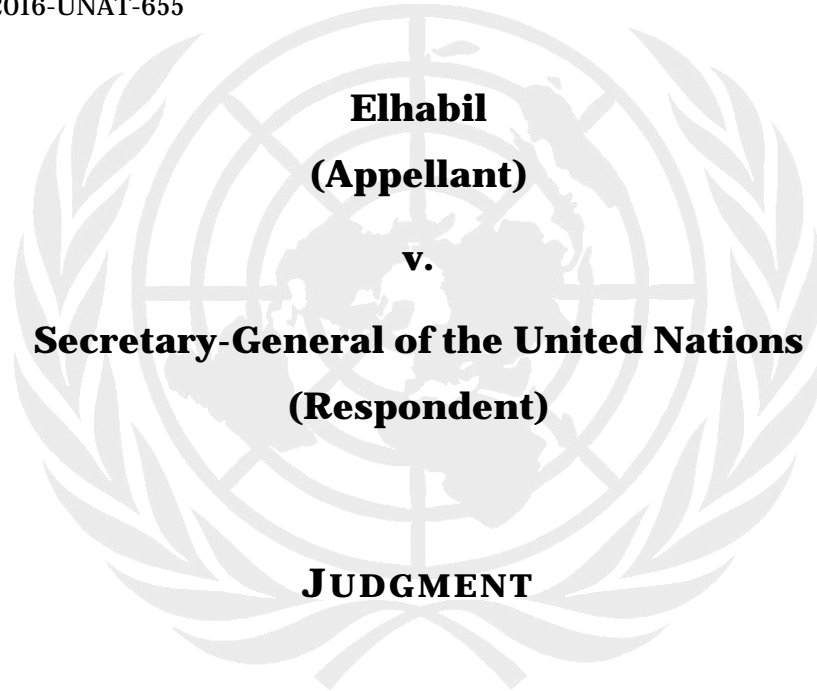




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-655



Before: Judge Rosalyn Chapman, Presiding
Judge Mary Faherty
Judge Richard Lussick

Case Nos.: 2015-862, 2015-863, 2015-865 and 2015-889

Date: 30 June 2016

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Ernesto Bondikov

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The Appeals Tribunal has before it the appeal by Mr. Basel Yousuf Elhabil of Judgment on Receivability No. UNDT/2015/100, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 23 October 2015, and Mr. Elhabil's appeals of Order Nos. 319 (NBI/2015) and 320 (NBI/2015) issued on 13 October 2015 and Order No. 400 (NBI/2015) issued on 28 December 2015, in the cases of *Elhabil v. Secretary-General of the United Nations*. On 11 April 2016, the Appeals Tribunal issued Order No. 259 (2016) consolidating the four appeals by Mr. Elhabil.

Facts and Procedure

2. In 2015, Mr. Elhabil was a staff member in the Gaza Field Office of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

Judgment on Receivability No. UNDT/2015/100

3. On 23 July 2015, Mr. Elhabil filed an application before the Dispute Tribunal contesting the “disqualification of his candidacy from posts in the United Nations and, in particular, unfair treatment by management by denying him full and fair consideration for many posts”.¹ On 7 September 2015, the Secretary-General filed a reply, challenging the receivability of Mr. Elhabil's application.

4. On 23 October 2015, the UNDT issued the Judgment on Receivability No. UNDT/2015/100, which determined that Mr. Elhabil's application was not receivable. The UNDT concluded that, as an UNRWA staff member, Mr. Elhabil was not challenging an administrative decision within the meaning of Article 2(1)(a) of the Dispute Tribunal Statute, as the Secretary-General's decision did not affect his employment contract with UNRWA and he was not covered by the United Nations Staff Regulations and Rules; and his challenge did not come within Article 3(1) of the Dispute Tribunal Statute as he was not a staff member of the United Nations Secretariat or a separately administered United Nations fund and programme.

¹ Impugned Judgment, para. 1.

5. On 27 October 2015, Mr. Elhabil appealed Judgment on Receivability No. UNDT/2015/100, and on 23 November 2015, the Secretary-General filed his answer to the appeal.

Order Nos. 319 and 320 (NBI/2015)

6. On 7 October 2015, Mr. Elhabil filed two applications before the UNDT for suspension of action pending management evaluation, which were registered, respectively, as Case No. UNDT/NBI/2015/105 (No. 105) and Case No. UNDT/NBI/2015/106 (No. 106). Each application for suspension of action pending management evaluation challenged a decision by the Office of Human Resources Management (OHRM) to disqualify Mr. Elhabil as a candidate for a job opening in the United Nations. On 8 October 2015, the Secretary-General filed replies to both applications, contending, *inter alia*, that the UNDT lacked jurisdiction to hear applications brought by an UNRWA staff member.

7. On 13 October 2015, the UNDT issued Order No. 319 (NBI/2015) in Case No. 105 and Order No. 320 (NBI/2015) in Case No. 106. Order Nos. 319 and 320 “rejected” the applications for suspension of action on the ground that Mr. Elhabil “has no *locus standi* to file the present Application as he is not a staff member who can challenge a decision before the UNDT within the meaning of art. 3 of the UNDT Statute”.

8. Subsequently, on 16 October 2015, the UNDT issued Order Nos. 323 (NBI/2015) and 324 (NBI/2015), which provided further reasoning for Order Nos. 319 and 320, respectively. In Order Nos. 323 and 324, the UNDT further explained that “[t]he *locus standi* of an individual before the UNDT does not depend only on the subject matter or nature of the litigation, which must be an administrative decision, but also on the status of the individual, that is, whether the individual is a staff member within the meaning of art. 101 of the Charter of the Organization”.²

9. On 13 October 2015, Mr. Elhabil appealed Order No. 319 (NBI/2015), which was registered by the Appeals Tribunal Registry as Case No. 2015-862, and on 16 October 2015, he appealed Order No. 320 (NBI/2015), which was registered as Case No. 2015-863. On 23 November 2015, the Secretary-General filed his answers to the appeals.

² *Elhabil v. Secretary-General of the United Nations*, Order No. 323 (NBI/2015), para. 21, and *Elhabil v. Secretary-General of the United Nations*, Order No. 324 (NBI/2015), para. 20.

Order No. 400 (NBI/2015)

10. On 22 December 2015, Mr. Elhabil filed an application before the UNDT for suspension of action pending management evaluation of a decision by OHRM to disqualify his application for the position of Director, Documentation Division, D-2, Department for General Assembly and Conference Management. There is no reply by the Secretary-General in the UNDT case record.

11. On 28 December 2015, the UNDT issued Order No. 400 (NBI/2015), which “refused [the application] for being not receivable” on the ground that Mr. Elhabil was an UNRWA staff member and UNRWA “does not fall under the jurisdiction of the UNDT nor does [Mr. Elhabil] fulfil the requirements of arts. 2.1(a) and 3 of the Statute of the UNDT. He therefore has no *locus standi* to challenge a decision of the [Secretary-General] before this Tribunal.”³ Additionally, the UNDT put Mr. Elhabil “on notice” that costs under Article 10(6) of the Dispute Tribunal Statute could be awarded against him if he were to bring another, similar application in the future, stating: “It should be more than apparent to [Mr. Elhabil] by now that these administrative decisions cannot be challenged before the UNDT”.⁴

12. On 25 January 2016, Mr. Elhabil appealed Order No. 400 (NBI/2015), which was registered by the Appeals Tribunal Registry as Case No. 2016-889. On 22 February 2016, the Secretary-General filed his answer to the appeal.

Submissions

Mr. Elhabil’s Appeals

In respect of Judgment No. UNDT/2015/100

13. The Dispute Tribunal cannot deny an UNRWA staff member the right to a fair trial, which is one of the main mandates of the United Nations internal justice system. UNRWA staff members fall under the jurisdiction of the Dispute Tribunal and meet the requirements of Article 2(1)(a) and Article 3 of the Dispute Tribunal Statute. UNRWA is a United Nations agency as the Secretary-General of the United Nations appoints the UNRWA Commissioner-General and the UNRWA Commissioner-General reports to the

³ *Elhabil v. Secretary-General of the United Nations*, Order No. 400 (NBI/2015), paras. 9 and 10.

⁴ *Ibid.*, para. 8.

General Assembly through the Secretary-General. There is no reason to deprive Mr. Elhabil of his right to have his grievances considered and to do justice for him.

14. During his applications for positions in the United Nations Secretariat, Mr. Elhabil was subjected to “prejudice action” and was denied full and fair consideration and his candidacy was not fairly evaluated.

15. Mr. Elhabil requests that the Appeals Tribunal “grant a decision” in respect of the selection processes for the Principal Electoral Officer and the Senior Electoral Officer positions and award him moral compensation for the suffering the unfair processes have caused him and his family.

In respect of Order Nos. 319, 320 and 400 (NBI/2015)

16. With some factual variations, Mr. Elhabil’s appeals advance the same arguments as in his appeal of Judgment No. UNDT/2015/100.

17. In his appeal in respect of Order No. 400 (NBI/2015), Mr. Elhabil states that he finds that order “shocking, deceitful and totally inaccurate”. Mr. Elhabil requests that the Appeals Tribunal “immediately suspen[d]” the UNDT’s “unfair action and [its] exaggerated, selective, biased and often false accusations against [him]”.

The Secretary-General’s Answers

In respect of Judgment No. UNDT/2015/100

18. The UNDT did not err in law when it concluded that under Article 3 of the Dispute Tribunal Statute, it did not have jurisdiction to hear an application brought by Mr. Elhabil, who was not a staff member of the Secretariat and did not have standing to appear before the Dispute Tribunal. This conclusion is consistent with Appeals Tribunal jurisprudence. Thus, the application was not receivable by the UNDT, as the Dispute Tribunal correctly determined.

19. Staff members of UNRWA cannot challenge decisions before the UNDT; rather, they have recourse to the UNRWA Dispute Tribunal, not the UNDT. Nevertheless, it is true that access to the UNDT may exist for a non-staff member “when there [is] some type of legal obligation on the part of the Organization”. There is no such legal obligation toward

Mr. Elhabil. He is in the exact same situation as anyone from outside the United Nations who applies for a position within the United Nations. If he is denied the position, he has no recourse to challenge the denial through the UNDT.

In respect of Order Nos. 319, 320 and 400 (NBI/2015)

20. The appeals of interlocutory orders, such as Order Nos. 319, 320 and 400 (NBI/2015), are not receivable *ratione materiae* by the Appeals Tribunal unless the Dispute Tribunal has exceeded its competence or jurisdiction in issuing the orders. Mr. Elhabil does not contend that the Dispute Tribunal exceeded its competence or jurisdiction; he claims the UNDT erred in law. Thus, the Appeals Tribunal should follow its jurisprudence and refuse to receive the appeals.

21. The Dispute Tribunal did not err in law when it determined that Mr. Elhabil's applications for suspension of action were not receivable as the UNDT has no jurisdiction to hear cases brought by non-staff members, who have no standing under Article 3 of the UNDT Statute to appear before the Dispute Tribunal. Despite Mr. Elhabil's claims to the contrary, staff members of UNRWA are not staff members of the Secretariat.

22. The appeals should be dismissed and Order Nos. 319, 320 and 400 (NBI/2015) should be affirmed.

Considerations

Judgment No. UNDT/2015/100

23. Initially, the Dispute Tribunal raised *sua sponte* the issue of jurisdiction or competence to hear and pass judgment upon Mr. Elhabil's application contesting the "disqualification of his candidacy from posts in the United Nations and, in particular, unfair treatment by management by denying him full and fair consideration for many posts". As we have held, it is quite proper for the UNDT to consider *sua sponte* the issue of jurisdiction,⁵ and it is appropriate to consider whether the Dispute Tribunal has jurisdiction before addressing the merits of an application.⁶

⁵ *Christensen v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-335.

⁶ *Saka v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-075.

24. Article 2 of the Dispute Tribunal Statute broadly sets forth those matters the Dispute Tribunal is competent to hear and pass judgment upon. In addition to administrative decisions imposing disciplinary measures and to enforce implementation of agreements reached through mediation, Article 2(1) provides, in relevant part:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To 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 the alleged non-compliance[.]

25. Article 3(1) of the Dispute Tribunal Statute provides, in pertinent part, that “[a]n 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”.

26. The Dispute Tribunal found Mr. Elhabil’s application contesting the “disqualification of his candidacy from posts in the United Nations and, in particular, unfair treatment by management by denying him full and fair consideration for many posts” was not receivable on several grounds. First, the UNDT determined that Mr. Elhabil was not a staff member within the meaning of Article 3 of the Statute of the Dispute Tribunal, as he was not appointed by the Secretary-General under the regulations established by the General Assembly. In other words, since Mr. Elhabil did not have a letter of appointment signed by the Secretary-General or an official acting on his behalf, which expressly incorporated the Organization’s Regulations and Rules and pertinent administrative issuances as the terms and conditions of appointment, he was not a staff member. Second, the UNDT explained:⁷

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 art. 3.1 of the UNDT Statute. The UNDT has no jurisdiction to hear applications from UNRWA staff members. The jurisdiction of the [Dispute] Tribunal is governed not

⁷ Impugned Judgment, para. 24. (Internal citations omitted.)

only by the subject matter or nature of the litigation, which must be an administrative decision, but also on the status of the individual, that is, whether the individual is a staff member within the meaning of art. 101 of the Charter of the Organization.

27. Lastly, the UNDT found that Mr. Elhabil “was a staff member of UNRWA”, which “entity does not fall under the jurisdiction of the UNDT ...”.⁸

28. The Appeals Tribunal determines that there is no merit to Mr. Elhabil’s claim that UNRWA staff fulfill the requirements of Article 3 of the UNDT Statute as UNRWA is a United Nations agency and the Secretary-General appoints the UNRWA Commissioner-General, who reports to the General Assembly through the Secretary-General. The UNDT correctly concluded that UNRWA staff members do not come within the definition of staff members of the United Nations set forth in Article 3(1)(a) of the Dispute Tribunal Statute. Moreover, UNRWA Area Staff Regulation 11.2 specifically provides that “[t]he United Nations Dispute Tribunal shall not hear or render judgement on applications from [UNRWA] staff members.” And the establishment of the UNRWA Dispute Tribunal as a separate tribunal from the UNDT further supports the UNDT’s conclusion.

29. Thus, the UNDT correctly found that, under Article 3(1)(a) of the UNDT Statute, an UNRWA staff member cannot bring an application against the Secretary-General of the United Nations challenging a decision by the Organization denying him or her employment with the Organization. In this regard, the UNRWA staff member is in the same position as an outsider who unsuccessfully applies for a job with the Organization, as the Secretary-General notes. There is no judicial recourse for either individual within the United Nations internal justice system. Moreover, as the UNRWA Commissioner-General was not the decision-maker, the UNRWA staff member also does not have access to the UNRWA Dispute Tribunal.

30. The UNDT was also correct in concluding that Mr. Elhabil’s application did not come within Article 2(1) of its Statute and, thus, was not receivable. As an UNRWA staff member, Mr. Elhabil’s employment contract is with UNRWA, rather than the Organization, and the terms of that contract or appointment under that contract were not affected by the Secretary-General’s decision to disqualify him from a post with the Organization. Thus,

⁸ Impugned Judgment, para. 25.

Mr. Elhabil was not challenging an administrative decision that was subject to judicial review under Article 2(1) of the Dispute Tribunal Statute, as the UNDT correctly concluded.

31. For all these reasons, the UNDT Judgment on Receivability should be affirmed.

Order Nos. 319, 320 and 400

32. The general principle underlying the right to appeal under Article 2(1) of the Appeals Tribunal Statute is that “only appeals against final judgments will be receivable”.⁹ Nevertheless, when it is clear that the UNDT has exceeded its jurisdiction or competence, an appeal of an interlocutory order may be receivable.¹⁰ “The import of our jurisprudence on the receivability of appeals against interlocutory orders is that the excess of jurisdiction or competence must be ‘clear’ or ‘manifest’”.¹¹

33. It, thus, falls upon the Appeals Tribunal to determine whether it has jurisdiction or is competent to receive and hear an appeal, pursuant to the provisions of Articles 2 and 7 of its Statute.¹²

34. Mr. Elhabil has appealed three orders denying three, separate applications for suspension of action pending management evaluation, i.e., Order Nos. 319, 320 and 400. Although these are interlocutory orders, Mr. Elhabil does not claim on appeal that the UNDT exceeded its jurisdiction or competence in issuing the orders. Rather, he strongly asserts that the UNDT erroneously failed to receive his applications—or to exercise its jurisdiction or competence—based on an error of law. This is insufficient to allow an appeal of an interlocutory order denying a request for suspension of action.¹³

⁹ *Mpacko v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-314, para. 15; *Wamalala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300, para. 16.

¹⁰ *Benchebbak v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-256; *Villamoran v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160; *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.

¹¹ *Porter v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-507, para. 21.

¹² *Ibid.*, para. 15.

¹³ *Kalashnik v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-661 issued during the 2016 Summer Session.

35. Moreover, Article 2(2) of the Dispute Tribunal Statute specifically prohibits the appeal of a “decision of the Dispute Tribunal on ... an application” to suspend, during the pendency of management evaluation, the implementation of a contested administrative decision.¹⁴

36. For these reasons, the appeals of Order Nos. 319, 320 and 400 are not receivable *ratione materiae*.

Judgment

37. The appeal is denied, and Judgment on Receivability No. UNDT/2015/100 is affirmed.

38. The appeals of Order Nos. 319 (NBI/2015), 320 (NBI/2015) and 400 (NBI/2015) are not receivable.

¹⁴ *Tiwathia v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-327, para. 8.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Lussick

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar