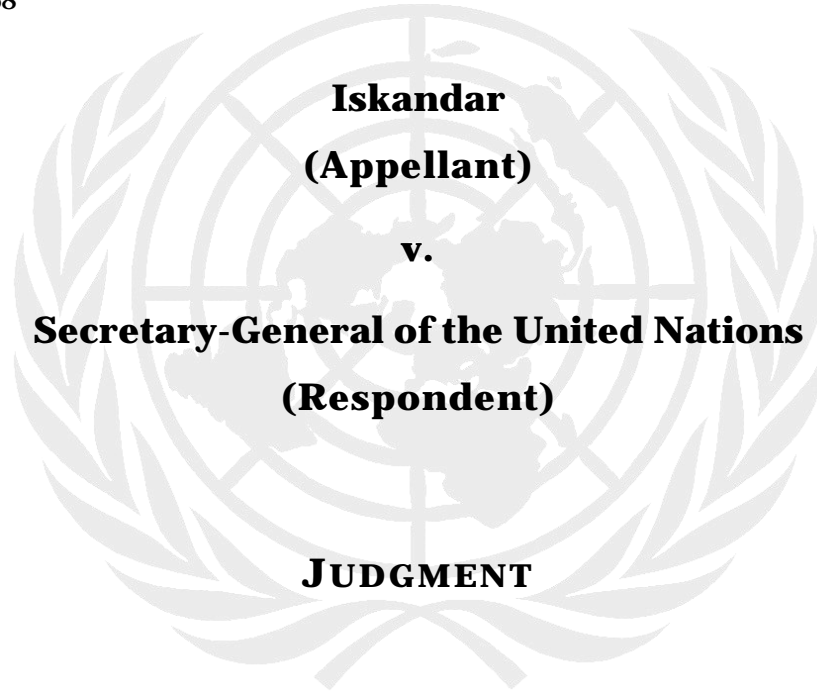




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-268



Before:	Judge Inés Weinberg de Roca, Presiding Judge Sophia Adinyira Judge Jean Courtial
Judgment No.:	2012-UNAT-248
Date:	29 June 2012
Registrar:	Weicheng Lin

Counsel for Appellant: Alexandre Tavadian

Counsel for Respondent: Wambui Mwangi

JUDGE INÉS WEINBERG DE ROCA, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by Mr. Abdul Aziz Iskandar against Judgment No. UNDT/2011/166 rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 21 September 2011 in the case of *Iskandar v. Secretary-General of the United Nations*.

Synopsis

2. The conditions of the loan agreement had been accepted by Mr. Iskandar and were binding while in force. Mr. Iskandar could have terminated his relationship with the World Food Programme (WFP) as foreseen in article 24 of the loan agreement but he did not do so. He had a valid employment contract with WFP and he did not fulfill the conditions for a termination under that same agreement. The appeal is dismissed.

Facts and Procedure

3. Mr. Iskandar was a staff member of WFP at the P-5 level. From June 2008 to January 2010, he was loaned to the African Union/United Nations Hybrid Operation in Darfur (UNAMID) under a reimbursable loan agreement (RLA). The terms of the RLA 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 RLA, Mr. Iskandar was to serve with UNAMID as Principal Officer for an initial period of three months. The RLA provided that Mr. Iskandar was loaned against reimbursement by UNAMID to WFP, that he was subject to the administrative supervision of UNAMID while continuing to be employed by WFP, governed by the WFP Staff Regulations and Rules, and paid by WFP. Mr. Iskandar retained specific return rights to WFP upon completion or termination of his assignment with UNAMID. The tripartite agreement between WFP, UNAMID and Mr. Iskandar specified: “[N]o offer of continuing employment shall be made to him [Mr. Iskandar] by UNAMID without consulting the releasing agency [WFP].” As a receiving agency, UNAMID agreed to reimburse WFP for all the expenses incurred in connection with the RLA, including Mr. Iskandar’s salary, benefits and allowances at his current P-5 step-XI level.

5. Mr. Iskandar assumed his functions as Principal Officer at UNAMID on 3 June 2008. His title was subsequently changed to “Deputy Director” due to operational reasons. Mr. Iskandar’s RLA was subsequently extended for periods of varying duration until 26 January 2010, when he reached the mandatory retirement age.

6. There was a dispute among WFP, UNAMID and Mr. Iskandar regarding the precise terms of the RLA when it was up for extension. In January 2009, WFP notified first UNAMID and subsequently Mr. Iskandar that WFP agreed to the extension of Mr. Iskandar’s RLA to 26 January 2010, but WFP’s agreement to extend the RLA “d[id] not include return rights to the Programme”. Both Mr. Iskandar and UNAMID objected to that term set by WFP.

7. In February 2009, Mr. Iskandar was interviewed for the position 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 (Acting CCPO), UNAMID, that Mr. Iskandar had been selected for the post of Deputy Director. But Mr. Iskandar did not receive a letter of appointment for the post of Deputy Director.

8. In response to Mr. Iskandar’s request for information, on 8 June 2009, the Acting CCPO/UNAMID informed Mr. Iskandar that, as he remained a staff member of WFP on loan to UNAMID, there was no need for a letter of appointment to be issued to him. The Acting CCPO advised Mr. Iskandar that he could be considered for an UNAMID appointment and, if selected, be given a letter of appointment, if he resigned from WFP.

9. In September 2011, the Acting CCPO notified Mr. Iskandar that his RLA had expired on 30 June 2009, and that after 1 July 2009 his mission service could be extended for more than three months only under a secondment arrangement entailing a contract with UNAMID, which was subject to the agreement of WFP, among others. On 10 September 2011, Mr. Iskandar signed the secondment proposal for the period 1 July 2009 to 26 January 2010. But there was no evidence that WFP agreed to this secondment arrangement.

10. On 5 November 2009, Mr. Iskandar requested management evaluation of the decision denying him the opportunity to transfer from WFP to UNAMID as Principal Officer and refusing to remunerate him retroactively at the D-1 level from the time he had assumed his functions as initially Principal Officer and subsequently Deputy Director at UNAMID until his retirement.

But the decision not to appoint Mr. Iskandar as Deputy Director, UNAMID, Khartoum Liaison Office, at the D-1 level, was upheld following the management evaluation.

11. Mr. Iskandar retired on 26 January 2010. He filed an application before the UNDT on 15 March 2010. In Judgment No. UNDT/2010/100, the UNDT rejected the application on the ground that the UNDT was not competent to hear the application in respect of two decisions: i) 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 ii) UNAMID's decision not to appoint him to the post of Deputy Director, Khartoum Liaison Office. With respect to i), the Dispute Tribunal found that it did not have jurisdiction to review the decision taken by WFP. Regarding ii), the Dispute Tribunal found that, as a WFP staff member who was on loan to UNAMID but had no contractual relationship with UNAMID, Mr. Iskandar did not have standing *ratione personae* to contest UNAMID's decision not to offer him an appointment.

12. On 8 July 2010, Mr. Iskandar appealed the UNDT judgment above to the Appeals Tribunal. In Judgment No. 2011-UNAT-116 dated 11 March 2011, the Appeals Tribunal overturned the UNDT judgment and remanded the case to the UNDT for determination of Mr. Iskandar's application in respect of the contested decision by UNAMID.

13. In Judgment No. UNDT/2011/166, the UNDT rejected Ms. Iskandar's application on the merits, finding that Mr. Iskandar had failed to establish that UNAMID had committed any fault by which its responsibility to him was entailed. Specifically, the UNDT rejected Mr. Iskandar's argument that during the period from 1 July 2009 to 26 January 2010 he was no longer on loan to UNAMID but was working for UNAMID under a secondment arrangement. The UNDT found that the same RLA governed his relationship with UNAMID during the entire period of his service from 3 June 2008 to 26 January 2010. The UNDT also found that any possible confusion created by UNAMID about whether Mr. Iskandar had been selected for the post of Deputy Director at the D-1 level was clarified by the Acting CCPO's email of 8 June 2009, which made it clear that Mr. Iskandar could not be promoted to a UNAMID post unless he resigned from WFP. The UNDT further found that Mr. Iskandar had not formally requested UNAMID to initiate the transfer procedure provided in the Inter-Organization Agreement.

14. The UNDT Judgment was issued in French on 21 September 2011. According to Mr. Iskandar, he received the English translation of the Judgment in late October 2011. On 4 November 2011, he filed an appeal from the UNDT Judgment. The Secretary-General filed an

answer on 29 December 2011. On 12 January 2012, Mr. Iskandar submitted a motion for leave to file additional pleadings in response to the Secretary-General's answer. In Order No. 77 (2012), the Appeals Tribunal rejected Mr. Iskandar's motion.

15. On 25 June 2012, and upon Mr. Iskandar's request, the Appeals Tribunal held an oral hearing in Geneva, Switzerland. Both parties attended the hearing.

Submissions

Mr. Iskandar's Appeal

16. Mr. Iskandar submits that the UNDT erred in law in concluding that only a letter of appointment was able to confer contractual rights for a staff member. This determination was inconsistent with *Gabaldon* and *Sprauten*,¹ which stand for the proposition that an offer of employment produces legal effects upon unconditional acceptance by a candidate. In the present case, Mr. Iskandar accepted the verbal information about his selection and relied on that information to perform the additional tasks and responsibilities of a Deputy Director. Mr. Iskandar should not be blamed for UNAMID's failure to make a written offer that he could duly accept.

17. The UNDT erred in law in believing that Mr. Iskandar had the responsibility to request a transfer. Mr. Iskandar could not have requested his transfer because he had never been formally informed of his selection for an UNAMID post. Mr. Iskandar maintains that UNAMID had an obligation to give him some notification which would allow him to substantiate his request for transfer. An offer of employment would have given Mr. Iskandar minimal assurance that by resigning from WFP he would not be unemployed and without a recourse. UNAMID's failure to advise WFP or Mr. Iskandar of the selection decision made it impossible for administrative instruction ST/AI/2006/3 (Staff selection system) to apply.

18. Mr. Iskandar maintains that it was unfair and unethical for the UNDT to expect Mr. Iskandar to resign in order to be considered for an UNAMID appointment without an offer of appointment.

¹ *Gabaldon v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-120; *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-111.

Secretary-General's Answer

19. The Secretary-General submits that the UNDT correctly concluded that Mr. Iskandar was required to resign from WFP before he could be appointed by UNAMID. It was not possible for Mr. Iskandar to simultaneously hold two appointments, one with WFP and the other with UNAMID. The fact was that Mr. Iskandar had categorically refused to relinquish his WFP status.

20. The Secretary-General also submits that though he was successful during the selection process for the D-1 post of Deputy Director, Mr. Iskandar's selection could not be implemented in accordance with administrative instruction ST/AI/2006/3 unless he relinquished his WFP status.

21. The Secretary-General further submits that Mr. Iskandar's reference to the report of the Joint Inspection Unit (JIU) to the General Assembly is irrelevant. The JIU was addressing staff members who were forced to give up seniority accrued in a given entity to accept a position in another. In the present case, Mr. Iskandar was not required to give up seniority accrued in WFP in order to accept an UNAMID position. Had he consented to relinquish his WFP status, Mr. Iskandar's service with WFP would have been counted for all purposes including credit towards within-grade increments, as if made at UNAMID.

Considerations

22. The UNDT Judgment held that, because Mr. Iskandar had not resigned from WFP and had not formally requested UNAMID to initiate the transfer procedure provided in the Inter-Organization Agreement, the offer of employment, i.e., the selection of Mr. Iskandar to the D-1 level as Deputy Director in UNAMID did not produce legal effects.

23. During the oral hearing Mr. Iskandar stated that he would have relinquished his return rights to, and resigned from, WFP if he had received a conditional offer of appointment from UNAMID.

24. In *Sprauten*,² this Tribunal held:

A contract is formed by an unconditional agreement between the parties on the terms and conditions for the appointment, before issuance of the letter of appointment, if all the

² *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-111, para. 25.

conditions for the offer are met by the candidate. The conditions for an offer should be understood as all those mentioned in the offer, those arising from the relevant rules of law for the appointment of staff members of the Organization, as recalled in Article 2, paragraph 2 (a) of the Statute of UNDT, and those necessarily associated with constraints in the implementation of public policies entrusted to the Organization.

25. The Inter-Organization Agreement covering the reimbursable loan of Mr. Iskandar, signed by WFP, UNAMID and Mr. Iskandar himself, in article 23 states that “the loaned employee shall return to the releasing agency upon completion or termination of his assignment with UNAMID and that no offer of continuing employment shall be made to him by UNAMID without consulting the releasing agency”.

26. The conditions of the RLA were accepted by Mr. Iskandar and thus binding while in force. Mr. Iskandar could have terminated his relationship with WFP as foreseen in article 24 of the loan agreement but he did not do so. He had a valid employment contract with WFP and he did not fulfill the conditions for termination under that same agreement.

27. Mr. Iskandar did not accept an unconditional offer of appointment by UNAMID because he was in no position to do so under the loan agreement. He did not formally initiate the transfer procedure and/or termination.

28. As the UNDT held, Mr. Iskandar was still on loan from WFP. The UNDT also found that any possible confusion created by UNAMID about whether Mr. Iskandar had been selected for the post of Deputy Director at the D-1 level was clarified by the Acting CCPO's email of 8 June 2009, which made it clear that Mr. Iskandar could not be promoted to an UNAMID post unless he resigned from WFP. Mr. Iskandar did not formally request UNAMID to initiate the transfer procedure provided in the Inter-Organization Agreement.

29. It follows from the foregoing that the UNDT Judge did not commit any error of law.

Judgment

30. The appeal is dismissed.

Original and Authoritative Version: English

Dated this 29th day of June 2012 in Geneva, Switzerland.

(Signed)

Judge Weinberg de Roca, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Courtial

Entered in the Register on this 12th day of September 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar