UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/48
Judgment No.: UNDT/2011/132
Date: 20 July 2011
Original: English

Before: Judge Coral Shaw

Registry: Geneva

Registrar: Víctor Rodríguez

GABALDON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant had received an offer of appointment to a post in Sudan, which he accepted. He received medical clearance, but before his letter of appointment was signed, he fell ill and the Organization withdrew the offer of appointment.

2. In an application filed on 23 April 2009 before the New York Joint Appeals Board ("JAB") the Applicant contested the decision to unilaterally withdraw the offer of appointment to the post.

3. The matter was transferred to the Dispute Tribunal on 1 July 2009. In.*Gabaldon* UNDT/2010/098 the Tribunal decided that the application was not receivable. The Applicant appealed this decision to the Appeals Tribunal ("UNAT").

4. By Judgment *Gabaldon* 2011-UNAT-120, UNAT annulled the Tribunal's ruling and remanded the case to the Dispute Tribunal with the instruction that it was to examine "whether [the Applicant] is entitled to access to the United Nations system of administration of justice and, if so, to rule on the case".

5. After a directions hearing held on 6 June 2011, the parties advised the Tribunal that the case could be decided on the papers without the need for an oral hearing. At the Tribunal's request, the Applicant later clarified that the remedies he sought were:

> a. Commensurate compensation for material damages, including, but not limited to, the amount of salaries he would have received had it not been for the withdrawal of the letter of appointment;
>
> b. Commensurate compensation for immaterial damages, including, but not limited to, the mental stress incurred both as an immediate result of the contested decision exacerbated by the unqualified promises during his period of illness and in the period after the contested decision, when the Applicant had to seek alternative employment without earning an income;

c. Commensurate compensation for the medical costs incurred, not already covered by his private medical insurance, which would otherwise have been covered by the medical insurance offered to staff members.

6. In response to the Tribunal's directions, the Respondent submitted additional comments on the issue of "whether the Applicant had satisfied all the conditions of the offer of employment to entitle him to contract-based rights with a view to his employment as a staff member within the Organization" and on the merits of the case.

7. Neither party sought an oral hearing of this case. The Tribunal has decided this case on the papers submitted by the parties.

Issues

8. In accordance with the UNAT Judgment, there are two issues to be decided:

a. Whether the Applicant and the Organization had concluded a contract for his recruitment as a staff member of the United Nations and therefore is entitled to access to the United Nations system of administration of justice;

b. If he were entitled to access to the United Nations system of justice, whether the Organization met its obligations to the Applicant.

Facts

9. The Applicant was interviewed for a position as Humanitarian Affairs Officer at the P-3 level with the United Nations Mission in Sudan ("UNMIS") on 2 August 2007. The record shows that shortly thereafter he was in contact with the administrative personnel of UNMIS following up on the procedure for the issuance of his contract, and that he was regularly reassured that the formalities were being accomplished.

10. On 30 April 2008, the Chief Civilian Personnel Officer, UNMIS, sent the Applicant an offer for a six-month appointment of limited duration ("ALD", under the 300 series of the former Staff Rules) as Humanitarian Affairs Officer at the P-3 level. The offer of appointment stipulated that it was "subject to [the Applicant] being medically cleared by the United Nations Medical Doctor" and that it "automatically elapse[d] in the event that the results of [the Applicant's] medical examination prove[d] unsatisfactory". It further provided that: "This offer of appointment is subject not only to medical clearance but also to the verification of references in support of [the Applicant's] qualifications or mission service." The offer also informed the Applicant that "[a] copy of the Staff Regulations and Rules [would] be made available to [him] when [he would sign] a Letter of Appointment, which [was] the official document by which [he would become] a staff member of the United Nations".

11. The Applicant accepted the offer of appointment on 1 May 2008, indicating that he would be available "30 days from the date of medical clearance". In its response dated 13 May 2008, UNMIS sent the Applicant additional forms for completion and return.

12. The UNMIS Medical Unit issued the medical clearance for the Applicant on 26 May 2008.

13. The Applicant wrote to the Human Resources Services Section ("HRSS") of UNMIS on 3 June 2008, asking whether it was in receipt of the results of the medical evaluation and requesting confirmation of the medical clearance. By email of the same day, an Officer of HRSS responded to the Applicant, informing him that he was medically cleared and that UNMIS was awaiting the issuance of the United Nations *laissez-passer* ("UNLP").

14. The Applicant was diagnosed with an illness on 28 July 2008 and was hospitalized. On 6 August 2008, he informed UNMIS about the diagnosis and the estimated recovery period. He explained that he would have to postpone his trip to Sudan and that the expected period of treatment was three to four months, after which he would be able to resume his work normally.

15. By email dated 20 August 2008, a Doctor from the UNMIS Medical Unit noted that a new medical report was needed stating that the Applicant's therapy was finished successfully and that he was "fit for job and fly".

16. By email dated 21 August 2008, copied to the Applicant, an Officer from HRSS confirmed that the Applicant would be able to report for duty contingent upon a medical report clearing him as fit for work in Sudan.

17. The Applicant sought clarification from the Humanitarian Affairs Liaison Unit of UNMIS in Khartoum in the following terms:

> That doesn't mean my recruitment is cancelled but that I need to be medically cleared again … to be deployed in Sudan.
> If I understood it right, it is not the standard UN test to be done again, but a medical report from the doctors who are treating me, right? …

18. In response to this email it was confirmed by the Recruitment Cell, HRSS, that he was right and that all that was required was "just a medical report on the current situation, after the medication".

19. On 16 December 2008, the Applicant provided HRSS with a medical report—in Spanish—from his treating physician, who stated that he was in full remission and that he could "retake his duties in his usual job".

20. On 17 December 2008, the UNMIS Medical Unit assessed the Applicant as "not fit" under classification 2B, which includes candidates with reduced life expectancy, or reduced work capacity. These are ineligible for employment.

21. By letter dated 21 December 2008, the Officer-in-Charge, HRSS, UNMIS, informed the Applicant of the formal withdrawal of the offer of appointment on the grounds that he was not medically cleared.

22. On 22 December 2008, the Applicant requested the UNMIS Medical Unit to review its decision to deny him medical clearance; the same day, the UNMIS Medical Unit forwarded this request to the Medical Services Division ("MSD") at UN Headquarters.

23. On 24 December 2008, the Applicant sent a copy of a sworn translation of his treating physician's report to a Doctor of the UNMIS Medical Unit.

24. MSD confirmed on 31 December 2008 that the Applicant was unfit for deployment to UNMIS, which was reiterated by MSD, again, on 30 January and on 23 February 2009.

25. By memorandum dated 13 January 2009, the Chief Civilian Personnel Officer, UNMIS, informed the Applicant that the decision not to medically clear him and to withdraw the offer of appointment was taken in accordance with the applicable rules.

26. The Applicant requested administrative review of the decision to withdraw the offer of appointment on 29 January 2009.

27. By letter dated 20 February 2009, the Administrative Law Unit of the Office of Human Resources Management, UN Secretariat, advised the Applicant that since he was not a staff member the internal justice system was not available to him.

Parties' contentions

28. In summary, the Applicant's principal contentions are:

a. The application is receivable *ratione personae* pursuant to former staff rule 111.2;

b. The offer of appointment was subject to medical clearance and the provision of additional documentation which had already been provided by the Applicant. The Applicant was medically cleared on 26 May 2008, and was informed in writing on 3 June 2008. As of the moment he received medical clearance the Organization could no longer withdraw the offer of appointment, as the conditions of the contractual terms agreed had been fulfilled;

c. The Applicant's acceptance of the offer of appointment created a contract for employment, entitling him to seek redress under the UN

internal justice system for the non observance of the rights afforded to him under this agreement. He relied on two aspects of Judgment No. 1290 (2006) of the former UN Administrative Tribunal. First, it held that, by agreeing with the conclusions of the JAB in the case in question, the Secretary-General implicitly recognized "that once an anticipated staff member accepts an offer of appointment from the Organization, a legal agreement is in force entitling that staff member to seek redress against an administrative decision alleging the non-observance of his or her rights under the agreement". Second, Judgment No. 1290 found that the Secretary-General accepted the JAB findings that "[t]he legal consequence of such a contract for employment is that the agreement remains valid, effective and in force, unless the Respondent can show that the contract has become impossible of performance at any particular time or the assignment proves not to be feasible in the near future";

d. It is the case for the Applicant that, before the contested decision, he informed UNMIS that he had fully recovered from his illness and was medically fit to resume his duties. This was supported by a medical report, first in Spanish and later in English;

e. The Organization failed to respect the contract for appointment, since it did not demonstrate "that performance would no longer be possible or feasible in the near future". By withdrawing the offer of appointment without verifying the Applicant's medical condition, the Organization failed to exercise due diligence, to which the Applicant was entitled;

f. The Applicant submitted that he was available to report for duty no later than 30 days from the date of medical clearance and the Organization did not refuse the suggested date to report for duty. Rather it indicated that only the UNLP had to be issued before the Applicant could travel to Sudan and report for duty. The UNLP reached the Applicant on 23 July 2008. This confirmed the medical clearance was equivalent to a travel authorization, and concluded the contact;

g. The diagnosis of his illness on 28 July 2008 came after the conclusion of his contract;

h. It is the case for the Applicant that his appointment started formally 30 days from the date of the medical clearance—that is, 30 June 2008, when he would have been available for official travel. In the alternative, should the Tribunal find that there was no contract on 26 June 2008, it would have entered into force one month after the Applicant was informed of his clearance—which happened on 3 June 2008, at a time when he would have been available;

i. The question whether the withdrawal of the offer was reasonable and appropriate is immaterial for the determination of the Tribunal's jurisdiction *ratione personae*. As the International Labour Organization Administrative Tribunal held in Judgment No. 2657, that "[i]t is only in a case where, even in the absence of a contract signed by the parties, the commitments made by the two sides are equivalent to a contract that the Tribunal can decide to retain jurisdiction".

29. The Respondent's principal contentions are:

a. On receivability, there were two conditions to the offer: medical clearance from the Medical Director and provision by the Applicant of letters of reference and copies of diplomas for verification. The Applicant did not fulfill either of the said conditions. While the Applicant suggests that the initial medical clearance on 3 June 2008 entailed compliance with this condition, he subsequently became ill and was declared medically unfit for duty by the Medical Director. Therefore, his offer of appointment automatically lapsed. Secondly, there is no evidence that the Applicant provided his references and diplomas, as required in the letter of offer;

b. On the merits of the case, the letter of 30 April 2008 stated that the offer would lapse in the event the results of the Applicant's medical examination proved unsatisfactory. The offer, hence, lapsed automatically when he was declared medically unfit;

c. The Applicant did not acquire the status of staff member because no letter of appointment was issued. The issuance of a letter of appointment is legally relevant; the Appeals Tribunal found in *El-Khatib* 2010-UNAT-029 that the issuance of a letter of appointment cannot be regarded as a mere formality. Pursuant to former staff rule 304.1, the letter of appointment is the document by which a candidate becomes a staff member and gains the benefits and entitlements that attach to such status;

d. The Applicant's argument that the formal commencement of his appointment was 30 days from the date of his initial notification of the medical clearance has no legal basis. This period was unilaterally asserted by the Applicant, not accepted by the Organization. In addition, former staff rule 304.2 provided that an appointment does not commence until the individual enters into official travel status, which the Applicant never did;

e. The withdrawal of the Applicant's offer was a valid exercise of the Administration's discretion. While initially declared medically fit, the Applicant subsequently became seriously ill and was declared medically unfit by the Medical Director on 17 December 2008. This was within the Medical Director's discretion. Moreover, "the medical fitness of a staff member is clearly a matter which is within the expertise of the medical unit, which cannot be substituted by the judgment of the Tribunal";

f. In the circumstances described, "[t]he Applicant's offer of appointment automatically lapsed". "Alternatively, it was reasonable to withdraw the offer of appointment and not to issue a [letter of appointment] given that the Applicant was not granted medical clearance";

g. The medical report submitted by the Applicant on 16 December 2008 stated that he could "retake his duties in his usual job" and "will also be subject to the established regular examinations". After review of this report the Medical Doctor declared the Applicant unfit under Classification 2B of the medical classification document ("Candidates with reduced life expectancy or reduced work capacity who are ineligible for employment");

h. The prognosis for the serious illness that the Applicant suffers is uncertain and there is a significant probability of relapses. Predictions of future good health are only made in statistical terms. In addition, the Organization has very limited medical services in Sudan, where the Applicant would have discharged his duties as specified in the letter of appointment. UNMIS duty stations are in a harsh environment, categorized as E or D duty stations, i.e., the lowest and second lowest categories in the hardship classification system. Neither the locations nor their medical services are designed for the follow-up care required for individuals suffering such a serious illness of the kind of the Applicant's;

i. The Applicant's allegations of countervailing circumstances are without merit. It is incorrect to assert that the emails from UNMIS Human Resources and Medical Units telling him that upon recovery from his illness he should submit a medical report and he would be able to resume duties amounted to an express promise that he would be medically cleared;

j. HRSS was simply advising the Applicant of the procedure to follow, confirming that he would need to submit a medical report on his situation at that time in order to gain medical clearance. "The representative did not, and could not have, given a guarantee to the Applicant that he would receive medical clearance", this being a matter within the purview of the Medical Director, as expressly provided in the letter of offer.

Considerations

Issue 1: Had the Applicant and the Organization concluded a contract for his recruitment as a staff member of the United Nations which entitled him to access to the United Nations system of administration of justice?

30. The question of when the Organization legally undertakes to employ a person as a staff member was considered by UNAT in *Gabaldon* 2011-UNAT-120. The Appeals Tribunal noted that, in accordance with its Judgment in *El Khatib* 2010-UNAT-029, the issuance of a letter of appointment

signed by the Secretary-General or an official on his behalf cannot be regarded as a mere formality. UNAT held that the contract by which an individual acquires staff member status can only be concluded validly on the date at which an official of the Organization signs the staff member's letter of appointment. However, the Appeals Tribunal went on to say in *Gabaldon* that:

> [T]his does not mean that an offer of employment never produces any legal effects. Unconditional acceptance by a candidate of the conditions of the offer of an appointment before the issuance of a letter of employment can form a valid contract, provided the candidate has satisfied all of the conditions.

31. In the present case, it is for the Tribunal to decide as a matter of fact whether the conditions of the offer of appointment made to the Applicant had been met to the extent that the only formal step left was the signing of a formal letter of appointment.

32. The relevant facts are that the Applicant received an offer of appointment on 30 April 2008. That offer was subject to three conditions before a letter of appointment could be signed. Each of these conditions is considered separately as follows:

a. Medical clearance by the UN Medical Doctor

33. It is an undisputed fact that the medical clearance for the Applicant was issued by the UNMIS Medical Unit on 26 May 2008. This condition was fulfilled.

b. The automatic lapse of the offer if the clearance was not satisfactory

34. There is no suggestion by the Respondent that the medical clearance issued on 26 May was not satisfactory. The Applicant had by that date advised of his availability to take up the position 30 days from the issuing of the medical clearance. The subsequent illness of the Applicant was not diagnosed until late July by which time the UNLP had been issued. The Tribunal finds that the offer did not lapse before it had been accepted unconditionally by the Applicant.

c. Verification of the Applicant's references and diplomas

35. It was only when the case was remanded to the Dispute Tribunal that the Respondent raised the point that there is no evidence that the Applicant provided his references and diplomas, as required in the letter of offer.

36. The Tribunal finds, as a matter of inferred fact from the papers submitted to it by the parties for consideration, that there is no evidence that the required references and diplomas had not been submitted. In the first place the Applicant said that the letters of reference and copies of diplomas had already been submitted. Second, there is no evidence of the Respondent requesting the Applicant to provide these documents or any indication that their absence was an impediment to the conclusion of the offer of acceptance. To the contrary, HRSS requested and obtained the issuance of the UNLP for the Applicant in anticipation of his taking up the post. As there is no reason to doubt that the required references had been provided to the satisfaction of the Organization, the Tribunal finds that this condition had been fulfilled.

37. In summary the Tribunal finds that by 1 May 2008 the Applicant had accepted the offer of employment subject to the medical clearance being issued. The Applicant was granted a medical clearance from the Organization on 26 May 2008. At that point, while in the words of UNAT this did not constitute "a valid employment contract before the issuance of a letter of appointment under the internal laws of the United Nations", it did "create obligations for the Organization and rights for the other party, if acting in good faith".

38. The Tribunal finds as a matter of fact that at 26 May 2008 all the essential conditions of the offer of appointment had been fulfilled by both parties creating the obligations and rights referred to by UNAT.

Issue 2: If the offer had become unconditional, did the Organization meet its obligations to the Applicant?

39. On the facts in this case, the only way in which the Respondent could relinquish its obligations to the Applicant was if the valid contact had been frustrated because the obligations in the contract were impossible to be fulfilled.

40. A frustrating event is one that is unforeseen or not in the direct control of either party. It so alters the nature of the contract that the continued employment of the employee would be radically different from what was contemplated at the time the contract was entered into. It would therefore be unjust to hold the parties to its original terms. In the words of Judgment No. 1290 "the contract has become impossible of performance at any particular time or the assignment proves not to be feasible in the near future".

41. In employment law, if a contract of employment is frustrated by a supervening event, both parties are discharged from further performance of it. Where a putative employee becomes ill after the agreement to employ has been concluded, the illness must be of sufficiently long lasting seriousness to amount to frustration.

42. In this case the Respondent argues that the Applicant's condition was too uncertain and required too much ongoing treatment to enable him to be declared fit for deployment to a location as harsh and lacking of medical facilities as Sudan. He was therefore unable to be given medical clearance.

43. The decision of the Respondent's medical service was that, in spite of his apparent recovery, the condition of the Applicant was of such a nature that it would require ongoing treatment and therefore he was unfit for the post in view of its location. That decision is within the discretion of the medical service. It is not for the Tribunal to interfere with a well founded expert opinion or to substitute its own views for that of the medical service.

44. The Tribunal finds that the Applicant's agreement to employ him was frustrated by the Applicant's illness, which was diagnosed after his contract had become unconditional. This was a circumstance out of the control or expectation of the Applicant or the Organization. It was not caused by the default of either party. The parties are therefore discharged of their obligations under the contract from the date on which he was declared medically unfit by the Respondent's medical advisors.

45. However the Tribunal considers that the Respondent was in breach of its obligations to the Applicant prior to the discharge of the contract. This arose from the Respondent's written answer to a specific question from the Applicant. He told him that all he needed to do before taking up his position was to provide a medical certificate from his own doctor which cleared him for service. This advice was wrong and unrealistically raised his expectations that his offer of employment was still alive in spite of his new illness.

46. The Applicant relied on that information in good faith and to his detriment. In acting in this way the Organization was in breach of its obligations to the Applicant to act with due diligence and fairness.

47. For this breach of fair procedure the Applicant is entitled to an award of compensation.

Remedies

48. Of the remedies claimed the only one which is sustainable in light of the Tribunal's findings is the claim for compensation for immaterial damages. Such damages are limited to the damage arising out of the breach of procedure.

49. In his request for administrative review of the decision of 29 January 2009, the Applicant referred to the stress caused by the long period of recruitment and the subsequent uncertainty and anxiety. In his application to the Tribunal the Applicant submitted that based on the communications received about the medical certificate required before he could take up his post, he made no efforts to find alternative employment for the period following his recovery.

50. The length of the recruitment period is not a matter before the Tribunal. No compensation can be awarded for that.

51. However the Applicant is entitled to compensation for the damage caused to him in reliance on the inaccurate information about the medical clearance. That damage included the stress referred to by the Applicant and his failure to apply for alternative positions in reliance on the representations by the Respondent. This reliance meant that he was unable to mitigate his loss in a timely fashion.

Conclusion

52. In view of the foregoing, the Tribunal DECIDES:

a. The decision to withdraw the offer of employment was lawful because the contract was frustrated by the Applicant's illness;

b. The Respondent breached its obligations to the Applicant when it failed to act with fairness and due diligence when it misinformed him of the correct procedural steps required before he could take up the offered position.

53. Tribunal therefore ORDERS:

a. The Applicant is awarded compensation equivalent to three months of the net base salary for the position of Humanitarian Affairs Officer with UNMIS at the P-3 level that was offered to him;

b. This sum is to be paid within 60 days after the Judgment becomes executable. Interest shall be charged on the above-mentioned amount as from the date on which the present Judgment becomes executable at the US Prime Rate applicable as at that date. If payment is not made within 60 days of the date this Judgment becomes executable, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Coral Shaw

Dated this 20th day of July 2011

Entered in the Register on this 20th day of July 2011

(Signed)

Víctor Rodríguez, Registrar, Geneva