



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/076

Judgment No.: UNDT/2011/166

Date: 21 September 2011

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

ISKANDAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Amal Oummih, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former staff member of the World Food Programme (“WFP”), who was loaned to the African Union/United Nations Hybrid Operation in Darfur (“UNAMID”) under a reimbursable loan agreement, is challenging the decision of UNAMID not to appoint him to the position of Deputy Director, Khartoum Liaison Office, at the D-1 level.

2. He asks to be promoted retroactively to the D-1 level as from June 2008 and to receive all the benefits and entitlements of that grade level, including a recalculation of his retirement pension rights. He asks further that UNAMID should be ordered to compensate him for the emotional distress suffered and to reimburse him for the expenses he has incurred in the present dispute.

Facts

3. The Applicant, while on the staff of WFP at the P-5 level, was loaned to UNAMID from 3 June 2008 to January 2010 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. The Applicant assumed his functions as Principal Officer at UNAMID in June 2008, and subsequently his title was changed, for operational reasons, to that of Deputy Director.

5. The loan, initially for three months, was extended for a period of two months, until 3 November 2008.

6. Between October 2008 and January 2009, several written communications were exchanged between UNAMID and WFP regarding the conditions under which the Applicant’s RLA might be further extended.

7. On 15 January 2009, WFP informed the Applicant that the RLA had been extended until 26 January 2010, the date of his mandatory retirement, and specified that the extension had been granted without return rights to WFP. In response to that message, both the Applicant and UNAMID registered their disagreement with the terms set by WFP.

8. In February 2009, the Applicant was interviewed for the position of Deputy Director (D-1), Khartoum Liaison Office, UNAMID.

9. By memorandum dated 8 March 2009, the Director of Mission Support informed the Acting Chief Civilian Personnel Officer, UNAMID, that the Applicant had been selected for the Deputy Director post. The Applicant, however, never received a letter of appointment.

10. On 8 June 2009, the Acting Chief Civilian Personnel Officer, UNAMID, sent an email to the Applicant informing him that he remained a staff member of WFP on loan to UNAMID and that therefore there was no need for a letter of appointment. He also advised the Applicant that, if he resigned from WFP, he could be appointed to UNAMID and then be given a letter of appointment.

11. By memorandum dated 1 September 2009, the Acting Chief Civilian Personnel Officer, UNAMID, notified the Applicant 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. The secondment was subject to WFP approval, satisfactory performance and organizational needs. On 10 September 2009, the Applicant signed the secondment proposal for the period 1 July 2009 to 26 January 2010.

12. On 5 November 2009, the Applicant submitted a request for a management evaluation of the decision denying him the opportunity to transfer from WFP to UNAMID and refusing to remunerate him retroactively at the D-1 level from the time he had assumed his functions at UNAMID until the time of his retirement.

13. The decision not to appoint him as Deputy Director of the Khartoum Liaison Office at the D-1 level was upheld in the reply dated 18 December 2009 to his management evaluation request.

14. The Applicant retired on 26 January 2010.

15. On 15 March 2010, the Applicant filed an application before the United Nations Dispute Tribunal. In Judgment No. UNDT/2010/100, the Tribunal considered that it was not competent to hear the case. The application was therefore rejected.

16. On 8 July 2010, the Applicant appealed the above-mentioned Judgment, and in Judgment 2011-UNAT-116 dated 11 March 2011, the United Nations Appeals Tribunal considered that the application to the first-instance Tribunal was admissible, and it remanded the case to the Dispute Tribunal for a hearing on the merits.

17. The case remanded by the Appeals Tribunal to this Tribunal was assigned initially to half-time Judge Coral Shaw, who on 10 June 2011 held a directions hearing with the Applicant, his Counsel and Counsel for the Respondent in attendance.

18. Because of Judge Shaw's departure from Geneva, the case was then assigned to Judge Jean-François Cousin.

19. On 12 September 2011, a hearing was held on the merits of the case, with the Applicant, his Counsel and Counsel for the Respondent in attendance.

20. Following that hearing, the parties submitted additional comments.

Parties' contentions

21. The Applicant's contentions are:

- a. The Applicant had a legitimate expectation that he would receive the benefits and entitlements of a D-1 post because he had been offered a

post at that level and he had been performing at that level since his arrival at UNAMID;

b. The exchange of documents and agreements between UNAMID and WFP regarding the extension of his services with UNAMID created a situation in which he legitimately believed that he had been transferred to UNAMID on a D-1 post until his retirement;

c. His services with UNAMID were extended from July 2009 to January 2010 not under a loan arrangement but under a secondment arrangement.

22. The Respondent's contentions are:

a. The application is not admissible as to decisions taken before 6 September 2009 because the Applicant requested a management evaluation only on 5 November 2009;

b. At no time was it agreed that the Applicant would be transferred to a D-1 post at UNAMID. Instead, he was on a mission assignment with UNAMID in accordance with the terms of an RLA between UNAMID and WFP;

c. The Applicant retained his status as a WFP employee and he did not seek to forego it. By so doing, he obtained additional benefits such as the post adjustment benefit applicable to Rome, which he would not have received had he been appointed to the staff of UNAMID;

d. Had the Applicant renounced his status as a WFP employee, including his return rights to WFP, he could have been appointed to a D-1 post at UNAMID. He did not wish to forego the rights he had as a WFP employee and he did not ask to be transferred to UNAMID.

Considerations

23. By Judgment 2011-UNAT-116 dated 11 March 2011, the Appeals Tribunal remanded Case No. UNDT/GVA/2010/076 to this Tribunal for a hearing on the merits. Accordingly, although the Appeals Tribunal did not rule specifically on the issue of the admissibility of the application regarding the time limits to appeal, this Tribunal considers that the Appeals Judge implicitly considered that it was admissible on those grounds, and that therefore this is no longer a matter to be determined by this Tribunal, despite the Respondent's written request to that effect, later orally withdrawn.

24. The Appeals Tribunal remanded the case to this Tribunal solely in respect of the issue of the legality of the UNAMID decision not to appoint the Applicant to the post of Deputy Director, Khartoum Liaison Office. The Tribunal considers itself bound by that remand decision and will therefore rule only on the latter issue.

25. Although Counsel for the Applicant maintained at the hearing that she had not had enough time prior to the hearing to review and possibly respond to a written testimony which she stated was brought to her attention only on 9 September 2011, this circumstance does not affect the validity of the present Judgment because Counsel had full opportunity, before the Judgment was rendered, either to contest the substance of the testimony orally, or to submit her comments subsequently. At all events, the Judgment is in no way based on facts put forward only in the testimony in question.

26. It is now necessary to examine what the Applicant's legal status was vis-à-vis UNAMID when the contested decision was taken.

27. The facts as set out above show that the Applicant, in accordance with the RLA of May 2008 between WFP and UNAMID governed by the Inter-Organization Agreement and signed by him on 23 May 2008, was loaned for an initial period of three months to UNAMID, the receiving agency for the loan, by WFP, the releasing agency, to serve as Principal Officer. The RLA provides that the Applicant is loaned against reimbursement by UNAMID to WFP, that he is

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. The RLA also specifies that UNAMID is to reimburse WFP for all expenses in connection with his salaries and benefits at his P-5 step XI level.

28. It is therefore very clear from that loan agreement that, as of 3 June 2008, UNAMID undertook to reimburse WFP only for the aforesaid expenses, namely, those relating to the P-5 level. Furthermore, none of the documentation on file supplied by either UNAMID or WFP establishes that the Applicant could have believed in good faith when he signed the RLA that he would be paid at the D-1 level or that he would be promoted to the D-1 level by UNAMID.

29. Subsequently, the RLA was extended twice, first for a period of two months until 3 November 2008, and subsequently until 26 January 2010 even though at the time of that final extension there were disagreements between the two organizations and the Applicant regarding the terms of the RLA.

30. Although, as stated at the hearing and then in writing in his last submission, the Applicant maintains that in fact 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 pursuant to a decision of 1 September 2009 to which he had agreed on 10 September 2009, it follows from the very terms of the document in question that the secondment offer from UNAMID to the Applicant was specifically contingent upon the consent of the releasing agency, WFP. Yet there is no evidence in the file that such consent was ever given.

31. Thus the Applicant cannot claim that he was serving under a secondment arrangement. He must as a result be deemed to have been still serving under the agreement by which WFP had loaned him to UNAMID until the date of his retirement in January 2010, with the same contractual arrangements as specified above, particularly with regard to the Applicant's P-5 level.

32. The Applicant claims that, after a selection process, he was informed verbally on 5 April 2009 that he had been selected for the post of Deputy Director,

Khartoum Liaison Office, at the D-1 level. Nevertheless, the fact remains that he never received a letter of appointment from UNAMID, a letter which, pursuant to staff rule 104.1 then in force, is alone able to confer contractual rights for a staff member.

33. Although the evidence in the file shows that, by memorandum dated 8 March 2009, the Director of Mission Support informed the Acting Chief Civilian Personnel Officer, UNAMID, that the Applicant had been selected for the post at issue, and although that memorandum could lead to confusion as to whether the selection had actually been made, the Acting Chief Civilian Personnel Officer, UNAMID, did clarify the Applicant's situation by email dated 8 June 2009, which reminded him that because he remained a staff member of WFP, he could not be promoted to a UNAMID post unless he resigned from WFP, which the Applicant did not do.

34. The foregoing indicates that the Applicant has not established that UNAMID made promises to him that it did not keep. At any rate, while the Applicant claims that UNAMID erred in not initiating procedures allowing him to be transferred from WFP to UNAMID without having to resign from WFP, no document included in the file shows that the Applicant asked UNAMID to initiate the transfer procedure provided for in the Inter-Organization Agreement referred to earlier, and the Applicant cannot reproach the organization for not having taken such a step without a formal request on his part.

35. It therefore follows from the above that the Applicant, who cannot claim any contractual relationship with UNAMID, has not established that this organization has committed any fault by which its responsibility to him is entailed. Accordingly, the application can only be rejected.

Conclusion

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

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 21st day of September 2011

Entered in the Register on this 21st day of September 2011

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry