UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2010/055/ UNAT/1725
Judgment No.:	UNDT/2012/056
Date:	19 April 2012
Original:	English

Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

FAGUNDES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant appeals against a decision by the Organization not to appoint her to a position for which she was initially identified as the preferred candidate but not formally appointed. The main legal issues in this case are whether the Applicant and the Organization had entered into a contract and whether the Applicant is entitled to access to the system of justice of the United Nations.

Preliminary matters

2. In Order No. 266 (NY/2011), dated 10 November 2011, in the context of allowing a brief reply to the application from the Respondent, which dealt solely with the law of receivability, the Dispute Tribunal made "a preliminary finding that the application is receivable". The issues of the Tribunal's competence to deal with the application and its merits are closely intertwined. If there had been a binding agreement between the Applicant and the Organization, the Tribunal has jurisdiction to consider her case and her claims may prevail on the merits. If there had been no binding agreement, her claims are outside of the Tribunal's jurisdiction. Having received further submissions from both parties, the Tribunal is now in a position to determine the question of jurisdiction by examining the facts and applying the law.

Hearing

3. By Order No. 290 (NY/2011), dated 1 December 2011, the Tribunal directed that it would deal with the case on the papers. The parties had previously consented to that. Until then, the Applicant had been represented by counsel. On 22 December 2011, her counsel was granted leave to withdraw.

4. On 7 March 2012, the Applicant sent an email to the Tribunal in response to a general notice to users of the Tribunal's electronic filing system. In her email she requested an update on her case and requested "to be present at the hearing".

5. On 12 March 2012, in light of this email, the Tribunal issued Order No. 47 (NY/2012), directing the Applicant to file and serve a submission stating whether she had amended her previous position on determining this case on the papers; whether she was now seeking an oral hearing; and, if so, stating the reasons for her request.

6. The Applicant replied on 13 March 2012, explaining that she "want[ed] to ascertain that the correct documentation and background information is presented". She stated that, based on her past experience, "there is no way to know what transpires before closed doors as in the previous case" and that she wanted to "ascertain that those hearing her case will be provided with all background information and documentation that was annexed" to her various submissions, and that said documentation will be fairly reviewed.

7. On 20 March 2012, the Tribunal issued Order No. 55 (NY/2012), in which it decided to consider the present case on the papers. The reasons given were that the case does not concern any disciplinary matters and that its outcome turns on the interpretation of the documents exchanged between the parties to determine if there was a duly constituted contract between them. This is a matter of law. The Tribunal observed that the Applicant did not seek to introduce any witness testimony or further documentation at the hearing and that the parties' submissions in this case were a matter of record.

8. In its determination of the present case, the Tribunal has considered all of the documentation submitted by the Applicant both before and after the withdrawal of her counsel.

Applicant's request for revision of a United Nations Appeals Tribunal's judgment

9. In a letter to the Dispute Tribunal, dated 22 December 2011, the Applicant requested the Tribunal to revise a judgment of the United Nations Appeals Tribunal (*Fagundes* 2010-UNAT-057). She submitted that the "substance and procedural errors" in the Appeals Tribunal's judgment were "at the root of what is being

considered regarding her subsequent loss of appointment" with the Department of Peacekeeping Operations ("DPKO") in 2006.

10. The background to this request is that, in 2007, the Applicant filed an application with the former United Nations Administrative Tribunal against the non-renewal of her contract in December 2005. On 31 July 2009, the Administrative Tribunal issued a judgment rejecting her application as time-barred. On 12 November 2009, the Applicant filed an application with the Dispute Tribunal, alleging that the judgment of the former Administrative Tribunal was based on a misstatement of facts and requesting its revision by the Dispute Tribunal. The Dispute Tribunal rejected her application, finding that it lacked jurisdiction to revise the judgments of the former United Nations Administrative Tribunal (*Fagundes* UNDT/2010/022). The Applicant appealed. The Appeals Tribunal rejected her appeal and affirmed the judgment of the Dispute Tribunal (*Fagundes* 2010-UNAT-057).

11. The Tribunal appreciates that the reasons for decisions made during the Applicant's previous employment may have had an influence on the decision of the Administration not to appoint her to the position that is the subject of the present case, however, the Tribunal does not have the power to revise judgments rendered by the Appeals Tribunal or the former United Nations Administrative Tribunal. The scope of the present case is limited to hearing the Applicant's case as set out in her application dated 28 May 2009, which concerns the events that arose in 2006. The Applicant's request for revision relating to her former case is not receivable. Her submissions concerning the substance of that case cannot be considered in the course of the present matter.

Facts

12. The following facts are taken from the case record, which includes all relevant submissions made on behalf of and by the Applicant.

13. The Applicant held several positions with the Organization from November 2000. She was separated on 31 December 2005.

14. In late 2005, the Organization posted a generic vacancy announcement for P-3 level positions of Public Information Officer with field missions administered by the DPKO. The vacancy announcement identified the education, experience, and language requirements and also broadly described the duties of the post and expected competencies. It did not contain any information regarding the type and nature of future appointment, date of commencement of work, its duration, and remuneration.

15. In or about September 2006, the Applicant applied as an external candidate for the advertised P-3 level position of Public Information Officer with the United Nations Stabilization Mission in Haiti ("MINUSTAH"), DPKO. She was interviewed on 26 September 2006.

16. On 27 September 2006, the Applicant had some correspondence with Mr. Guillermo Forteau in the Communication and Public Information Office, MINUSTAH, about the "Radio Producer post in Haiti", and she sent him her updated personal history form. It is unclear whether the Radio Producer post was the same post as the Public Information Officer or a different post.

17. On 4 October 2006, Mr. Forteau sent her an email, which stated:

> I am pleased to inform you that you have been selected to serve with the United Nations Stabilization Mission in Haiti (MINUSTAH) as Public Information Officer.
>
> You will be contacted in the next coming week by the Personnel Management & Support Service, Office of Mission Support in the Department of Peacekeeping Operations with all the details of your recruitment and we look forward [to] welcoming you to MINUSTAH in the very near future.

18. On the same day the Applicant replied: "Many thanks for the excellent news! I look forward to joining MINUSTAH". According to the Applicant, she immediately

took steps to be ready to move on very short notice, including subletting her apartment and selling her car.

19. The Applicant was not contacted in the following week. On her account, she talked a few times with DPKO staff and was told to wait.

20. On 11 October 2006, MINUSTAH provided the Applicant's name as the selected candidate to the Integrated Human Resources Management Team of Personnel Management and Support Services ("PMSS"), DPKO, for evaluation.

21. The Applicant submits that on 6 November 2006, Mr. Sin of the Executive Office of DPKO verbally told her that she would receive the official offer of appointment for a six-month renewable contract in a week.

22. On 27 November 2006, after the Applicant had made several more calls to Mr. Forteau, Mr. David Wimhurst, Director, Communication and Public Information Office, wrote to her asking to be patient regarding the possibility of an appointment with MINUSTAH. He wrote:

> While we may have indicated our interest in your candidacy, nothing can be considered final until HQ approves, and this process is neither automatic nor speedy. You should not consider your appointment final until [you] have received a letter from personnel section and I would advise you not to make any arrangements until then. You therefore do not need to keep contacting Mr. Forteau asking him for information.

23. She replied on 27 November 2006, reiterating that she was ready to join MINUSTAH and explaining the measures she had taken since receiving the notification on 4 October 2006, which included subletting her apartment, disconnecting her mobile phone, and selling her car.

24. In or around November 2006, PMSS made the decision not to select the Applicant for the post based on her previous employment history.

25. The Respondent explained that, during the check of the Applicant's employment history with the United Nations, PMSS became aware that the Applicant had received a partially unsatisfactory performance evaluation, which was confirmed after a rebuttal process, and, based on that, decided not to select the Applicant. It gave priority to another candidate.

26. In its submission to the Tribunal, the Respondent explained the recruitment process for mission service at the time. The mission proposed a candidate for selection based on a process that included completion of an interview report and a comparative analysis endorsed by either the mission's Chief Administrative Office or Director of Administration. The selection facsimile was then sent to the Team Leader in the Integrated Human Resources Management Team of PMSS, DPKO, for evaluation, including the reference checks and the substantive review of the candidate's qualifications. If, after this evaluation, the PMSS Team Leader agreed with the mission's selection, he or she would sign the offer of appointment and forward it to the selected candidate.

27. On 13 December 2006, the Applicant received a final email from Mr. Wimhurst. It stated: "Please be advised that following our checks with employment references we have decided that priority should be given to another candidate. The correspondence is therefore now closed".

28. The Applicant sought an administrative review within time and the matter was eventually dealt with by the Joint Appeals Board, following which the Applicant filed an application with the former United Nations Administrative Tribunal. Following the abolishment of the Administrative Tribunal, the case was transferred to the Dispute Tribunal effective 1 January 2010.

Applicant's submissions

29. The Applicant's principal contentions may be summarised as follows:

a. The email of 4 October 2006 from Mr. Forteau constituted an unequivocal and unconditional offer. The Applicant accepted the offer and took steps to move on very short notice. There was a formal, legally binding contract between the United Nations and the Applicant;

b. Assuming that PMSS had the sole authority to decide on recruitment, the email of 4 October 2006 meant that PMSS had approved her recruitment. Further, the documents in this case suggest that the Applicant's candidacy was first reviewed by PMSS before the Applicant was included in the short list sent to MINUSTAH, and that, after careful review, on 11 October 2006, MINUSTAH requested PMSS to immediately initiate recruitment procedures for the Applicant;

c. PMSS did not inform the Applicant of the negative information they had received about her, which was a breach of due process;

d. The Applicant suffered "tremendous harm, both financial and psychological". In her amended pleas on relief, she requests compensation for the "[five] years that her career with the UN has been halted", including salaries and various entitlements. She also requests to be given "a suitable post at the P-3 or P-4 level".

Respondent's submissions

30. The Respondent's principal contentions may be summarised as follows:

a. The application is not receivable. The Applicant was not employed by the United Nations at the time of her job application;

b. An individual can only be considered as having entered into a contractual relationship with the Organization upon signing a letter of appointment. The Applicant never received an offer of appointment, let alone a letter of appointment. It would be illogical to say that a contract was created between the parties before all terms and conditions were known by same, which only happens when the letter of appointment is signed;

c. Mr. Forteau's email of 4 October 2006 was not an offer of appointment. He had no authority to enter into a contract with the Applicant, nor did he purport to do so. The email did not set out any of the essential terms of a contract of employment, but merely conveyed that the Applicant was MINUSTAH's selected candidate for the post and that the actual recruitment would be done by PMSS;

d. PMSS properly undertook its duty to check and consider the references of a proposed candidate, in making a final determination on whether to offer the Applicant an appointment with MINUSTAH. It was within the discretion of PMSS to decide not to select her based on the less than satisfactory performance evaluation;

e. The Applicant has failed to show that she suffered any loss as a result of the alleged breach. Her actions following the receipt of the email of 4 October 2006 were premature and not caused by the Organization. The exchanges that followed between the Applicant and the Organization show that she had doubts about the status of her recruitment. As a former staff member, she could not have believed that the email exchange of 4 October 2006 was a binding offer and acceptance.

Consideration

Contract of employment

31. Pursuant to art. 3.1 of its Statute, the Tribunal is competent to hear and pass judgment on an application if it is filed by a staff member, former staff member, or a person making claims in the name of an incapacitated or deceased staff member. For the Tribunal to have jurisdiction over this case, the Applicant must be able to demonstrate that there was a concluded contract between her and the Organization, sufficient to give her access to the internal system of justice of the Organization.

32. Generally, a contract is an agreement giving rise to obligations which are enforced or recognised by law.[1] A contract of employment is generally formed upon unconditional acceptance of an offer containing the essential terms of the agreement.

33. An offer is an expression of willingness to enter into a contract on specified terms, made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed. An acceptance is a final and unqualified expression of assent to the terms of an offer. An agreement is not a binding contract if it lacks certainty, either because it is too vague or because it is obviously incomplete.

34. Whether a binding contract has been concluded is established by making an objective assessment of what the parties said and did at the time of the transaction. What the parties later say they intended to do is secondary to the evidence of their contemporaneous acts.

35. In *El-Khatib* 2010-UNAT-029, the Appeals Tribunal 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 held in *Gabaldon* 2011-UNAT-120 that this does not mean that an offer of employment and its acceptance never produce any

---

[1] Treitel, *The Law of Contract* (Sweet & Maxwell, 2007).

legal effects. The 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. The Appeals Tribunal held that access to the system of administration of justice by persons who have not formally signed a letter of appointment is limited to those who are legitimately entitled to benefit from the protection of the laws by way of a concluded contract, albeit short of a signed letter of appointment.

36. The Appeals Tribunal gave examples of the cases where a person has begun to exercise his or her functions based on acceptance of the offer of employment or where the contracting party proves that he or she has fulfilled all the conditions of the offer and that his or her acceptance is unconditional, meaning that no issue of importance remains to be discussed between the parties.

37. Under staff regulation 4.1, upon appointment each staff member shall receive a letter of appointment in accordance with the provisions of Annex II to the Staff Regulations. But this does not mean that the only document capable of creating legally binding obligations between the Organisation and its staff has to be called a "letter of appointment" (*Garcia* UNDT/2010/191). What matters is the substance. As the Administrative Tribunal of the International Labour Organisation stated in Judgment No. 307, *In re Labarthe* (1977),

> It is quite often the case that, when a contract … has been concluded, it will be followed by a formal document; in the case of a large organisation which is accustomed to use its own forms, there will almost certainly be a letter of appointment. This does not mean that there can be no binding contract until the letter of appointment has been issued. There is a binding contract if there is manifest on both sides an intention to contract and if all the essential terms have been settled and if all that remains to be done is a formality which requires no further agreement.

Did the Applicant and the Organization enter into a binding contract?

38. The questions to be considered in this case are whether, on the material before it, the Tribunal can be satisfied that there was an intention on both sides to enter into a contract and whether the essential terms of the agreement were sufficiently certain.

39. What are the essential contractual terms in the United Nations context? Pursuant to former staff rule 104.1, a letter of appointment contains "all the terms and conditions of employment". Annex II to the Staff Regulations provides a list of terms that shall be included in a standard letter of appointment. They include, *inter alia*, the nature and the period of employment, the category and the level of the appointment, and details concerning salary and other conditions of employment (see ST/SGB/2006/4 (Staff Regulations), Annex II (Letters of appointment)):

> LETTERS OF APPOINTMENT
>
> (a) The letter of appointment shall state:
>
> (i) That the appointment is subject to the provisions of the Staff Regulations and of the Staff Rules applicable to the category of appointment in question and to changes which may be duly made in such regulations and rules from time to time;
>
> (ii) The nature of the appointment;
>
> (iii) The date at which the staff member is required to enter upon his or her duties;
>
> (iv) The period of appointment, the notice required to terminate it and period of probation, if any;
>
> (v) The category, level, commencing rate of salary and, if increments are allowable, the scale of increments, and the maximum attainable;
>
> (vi) Any special conditions which may be applicable.

40. Not all terms and conditions specified in Annex II are necessarily essential components of a binding contract, but at the very least a contract of employment should include, as standard essential terms, the date of commencement of work, its duration, and remuneration for the work performed.

41. The following essential terms were missing from the email of 4 October 2006:

a. the date at which the Applicant's was required to enter upon her duties;

b. the period of her appointment;

c. her step within the P-3 level and the commencing rate of salary. There are fifteen steps for P-3 level positions, with pensionable remuneration for professional staff in the field service category ranging at the time from USD99,966 at step I to USD137,238 at step XV (see ST/SGB/2006/1 (Amendments to the 100 Series of the Staff Rules), Appendix A).

42. Further, the vacancy announcement for which the Applicant applied did not contain these or other essential terms. It was a generic announcement containing general requirements for applicants and outlining general responsibilities and inviting applications for multiple posts in different duty stations.

43. The Tribunal finds that there was no meeting of the minds between the parties on the essential terms on 4 October 2006 or later. The Applicant had not started to exercise her functions and several essential terms of the agreement remained to be agreed on before it could be considered a binding contract.

44. If the Applicant was verbally informed by the Executive Office of DPKO on 6 November 2006 that she would receive the "official offer of appointment" for a six-month renewable contract in a week, this may have reinforced her understanding and expectation that the position was hers, but such advice should also have been a signal to a person with previous experience in the United Nations system that she was not yet appointed.

45. The Tribunal finds that the Applicant's actions in arranging for her departure to Haiti were premature. The email of 4 October 2006 was so uncertain that her

communication in response could not have resulted in a binding contract. In the absence of agreement about the date of commence of her employment, its duration, or her remuneration she had no proper basis to believe that there was a concluded contract between her and the Organization. In the words of the Appeals Tribunal in *Gabaldon*, "issue[s] of importance remain[ed] to be discussed between the parties". The Tribunal does not accept the Applicant's submission that there was an unequivocal and unconditional offer which she accepted. Therefore, no contract of employment was in place.

Conclusion

46. No binding contract of employment was concluded by the Applicant and the Organization. The Applicant was not a staff member at the time the decision was made not to select her for the vacancy. The Tribunal does not have jurisdiction over this case.

47. The application is rejected.

(*Signed*)

Judge Coral Shaw

Dated this 19th day of April 2012

Entered in the Register on this 19th day of April 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York