



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/011
Judgment No.: UNDT/2012/113
Date: 24 July 2012
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

EL MOCTAR

v.

SECRETARY-GENERAL OF THE
UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Self-Represented

Counsel for Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Introduction

1. The Applicant was a member of the UN police force (“UNPOL”) working with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”) in Kinshasa. On the night of 7/8 November 2010, the Applicant was involved in a car accident in an official vehicle. The Applicant states that when driving home past the compound of the United Nations High Commissioner for Refugees (UNHCR), a vehicle laden with bananas appeared on the wrong side of the road, and in attempting to avoid it, the Applicant swerved into the UNHCR compound. The accident damaged the fence, a UNHCR sign, and two trees, and was witnessed by a UNHCR Security Guard.
2. The accident was investigated by the Internal Investigations Officer of UNPOL, who interviewed the Applicant. The Applicant admitted driving during the hours of curfew and failing to report the accident to the authorities. The Investigation Report concluded that the Applicant was guilty of violating the curfew, driving at excessive speed, and failing to report the accident to the competent authorities.
3. Following receipt of the Investigation Report, the UNPOL Commissioner and Chief of the Police Component, Mr. Wafy Abdallah, concluded that the Applicant’s conduct, whilst not serious misconduct, was conduct inappropriate for a UN Police Officer, and so issued the Applicant with a reprimand and requested that the incident be noted in the Applicant’s personnel file.
4. On 14 March 2011, the Applicant filed an Application with the United Nations Dispute Tribunal (UNDT), contesting the decision of the Police Commissioner of MONUSCO to impose the sanction of a reprimand and to place a note on the Applicant’s personnel file.
5. On 28 April 2011, the Respondent filed a Reply on Receivability.
6. On 5 June 2012 the Tribunal requested further information from the Respondent, specifically whether there was any contract or other document signed by the Applicant upon entry into service with the Organization.

7. On 12 July 2012 the Respondent filed short additional submissions responding to the Tribunal's request.

Receivability

8. As a preliminary matter, the Respondent submits that the Application is not receivable *ratione personae* because the Applicant is not a staff member of the United Nations. The Respondent avers that the Applicant was temporarily engaged as a member of UNPOL, which is an international law enforcement entity separately administered outside the UN Secretariat, and his engagement is governed by ST/SGB/2002/9 (Regulations Governing the Status, Basic Rights and Duties of Officials, and Experts on Mission) which clearly indicates that the Applicant is deemed an "expert on mission" and not an official of the UN Secretariat.

9. The Respondent argues that an "expert on mission" remains accountable to the Organization for the proper discharge of their functions, but in the case of UNPOL officers, such personnel remain "under the jurisdiction of their own country".

10. The Respondent further submits that the Applicant has never received a letter of appointment. Relying on *El-Khatib* 2010-UNAT-029, the Respondent argues that in the absence of such a letter of appointment, the Applicant cannot claim that a valid employment contract was entered into, such that he became a staff member of the Organization.

Consideration

The jurisdiction of the Dispute Tribunal

11. When establishing the new system of internal justice of the United Nations, the General Assembly, in its resolution 62/228 of 6 February 2008, paragraph 7, decided "that individuals who have access to the current system of administration of justice shall have access to the new system".

12. However, in adopting the Statute of the Dispute Tribunal, by resolution 63/253 of 24 December 2008, the General Assembly limited the scope of access to the Tribunal through the wording of article 3.1. This is less generous than the equivalent article 2 of the former United Nations Administrative Tribunal which preceded it. The former provision was as follows:

2. The Tribunal shall be open:

(a) To any staff member of the Secretariat of the United Nations even after his or her employment has ceased, and to any person who has succeeded to the staff member's rights on his or her death;

(b) To any other person who can show that he or she is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied.

13. In contrast, article 3.1 of the Statute of the Dispute Tribunal stipulates:

An 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;

(b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

14. Thus it would seem that, contrary to its resolution 62/228, the General Assembly ultimately chose to reduce the scope of access to the new Dispute Tribunal when compared to its predecessor. It is noteworthy, however, that in its resolutions 62/228, 64/233 and 65/251 (Administration of justice at the United Nations), the General Assembly requested the Secretary-General to provide further and “more concrete” information and recommendations to it on the

different categories of non-staff personnel performing personal services for the Organization, including experts on mission. Specifically, in resolution 62/228, at paragraph 66, the General Assembly asked for further information on:

- (a) The different categories of non-staff personnel performing personal services for the Organization, including experts on mission, United Nations officials other than staff members of the Secretariat and daily workers;
- (b) The types of dispute settlement mechanisms available to the different categories of non-staff personnel and their effectiveness;
- (c) The types of grievances the different categories of non-staff personnel have raised in the past and what bodies of law are relevant to such claims;
- (d) Any other mechanism that could be envisaged to provide effective and efficient dispute settlement to the different categories of non-staff personnel, taking into account the nature of their contractual relationship with the Organization.

15. In his response to this request, the Secretary-General stated in his Note (A/62/748) of 14 March 2008:

With the exception of experts on mission holding consultant contracts, the Secretariat is not aware of any established or specified recourse mechanism or procedure applicable to experts on mission. The terms and conditions of service of other experts on mission, including any recourse mechanism or procedure, are established by the appointing body.

“Experts on mission” remain accountable to the Organization for the proper discharge of their functions. However, in certain cases (United Nations police, formed police units and United Nations military observers), these individuals remain under the jurisdiction of their own country. This means that while the Organization’s disciplinary directives apply to these individuals, the Organization is limited in the actions it can take, should the relevant standards of conduct be violated.

16. It would seem that in the Respondent’s view, as evinced by A/62/748, UNPOL officers do not have any recourse mechanism for the resolution of disputes with the United Nations. In resolution 64/233 of 16 March 2010 the General Assembly requested that the Secretary-General report on the pros and cons of an expedited arbitration procedure, a simplified procedure before the

UNDT, and the granting of access to the UNDT to non-staff personnel. This request was reiterated in resolution 65/251 of 2 March 2011. However, and notwithstanding these repeated requests, the Secretary-General's latest "concept paper" on the subject (Annex II to his report on Administration of justice at the United Nations (A/66/275) appears to exclude from consideration those "experts on mission" who do not have contracts.

Definition of "staff member"

17. In view of the limitation of its jurisdiction referred to above, the Tribunal must consider whether or not the Applicant UNPOL officer is an individual having access to it by virtue of being a 'staff member' or a former 'staff member'.

18. The Charter of the United Nations established the Secretariat and staff through articles 97 and 101. The pertinent provisions are that "[t]he Secretariat shall comprise a Secretary General and such staff as the Organization may require"¹ and "[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly."²

19. The Staff Regulations define "staff members" or "staff" as referring to "all the staff members of the Secretariat, within the meaning of article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to article 101, paragraph 1, of the Charter"³.

20. Staff regulation 4.1 reads:

As stated in Article 101 of the Charter, the power of appointment of staff members rests with the Secretary-General. Upon appointment, each staff member, including a staff member on secondment from government service, shall receive a letter of appointment in accordance with the provisions of annex II to the present Regulations and signed by the Secretary-General or by an official in the name of the Secretary-General.

¹ Charter of the United Nations, article 97.1

² Charter of the United Nations, article 101.1

³ Staff Regulations, ST/SGB/2009/6, 'Scope and purpose'.

21. The Tribunal considered the definition of a staff member in *Turner* UNDT/2010/170, stating:

It is clear that the Charter requires that staff members be “appointed” by the Secretary-General (or those to whom this power has been delegated). The hallmark of staff relationship is “appointment”, and this is done through a letter of appointment pursuant to staff regulation 4.1. The Staff Regulations apply to all staff members of the Secretariat, within the meaning of Article 97 of the Charter, whose employment relationship and contractual link with the Organization are through a letter of appointment issued pursuant to regulations promulgated by the General Assembly. Such letter is signed either by the Secretary-General or by an official in the name of the Secretary-General.⁴

22. In *Gabaldon* 2011-UNAT-120, the Appeals Tribunal endorsed this view, stating that “the legal act by which the Organization legally undertakes to employ a person as a staff member is a letter of appointment signed by the Secretary-General or an official acting on his behalf.” However, the Appeals Tribunal went on to state:

Access to the new system of administration of justice for persons who formally are not staff members must be limited to persons who are legitimately entitled to similar rights to those of staff member. This may be the case where a person has begun to exercise his or her functions based on acceptance of the offer of employment. Having expressly treated this person as a staff member, the Organization must be regarded as having extended to him or her, the protection of its administration of justice system.

Status of UNPOL officers

23. The Respondent avers that UNPOL officers such as the Applicant are “experts on mission” and as such, are not staff members and do not have access to the Dispute Tribunal.

24. “Experts on mission” is a term apparently derived from article VI, section 22 of the Convention on the Privileges and Immunities of the United Nations,⁵ and thus specifically excluded from the class of persons who could be described

⁴ *Turner*, UNDT/2010/170, paragraph 28.

⁵ 13 February 1946.

as Secretariat officials or staff members. It should be pointed out that the Convention does not define “experts on mission” other than as individuals who can be distinguished from Secretariat officials.

25. ST/SGB/2002/9 (Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission) indeed sets out the basic rights and duties of “experts on mission” but does not go so far as to define them. *Inter alia*, regulation 2(c) states that “experts on mission” are required to conduct themselves with the interests of the Organization only in view. Regulation 3 states that “[o]fficials and experts on mission are accountable to the United Nations for the proper discharge of their functions.”

26. The “Guidelines on United Nations Police Officers on Assignment with Peacekeeping Operations”⁶ (the “Guidelines”) which set out the ‘General Conditions of Service of United Nations Police Officers’, defines them as:

*...police or other law enforcement personnel assigned to serve with the United Nations on secondment by Governments of Member States at the request of the Secretary-General.*⁷

27. All UN Police Officers, including the Applicant, are made to sign an undertaking which requires them to agree to comply with the Regulations set out in ST/SGB/2002/9. Upon his arrival at MONUSCO, the Applicant signed an Undertaking and Declaration as an “expert on mission” in which he acknowledged that he understood ST/SGB/2002/9 and agreed to be bound by all mission standard operating and administrative procedures, policies, directives, and other issuances.

28. It would be all too easy to accept the assertion that UNPOL officers are “experts on mission” and, as such, they cannot be staff members. But the term “experts on mission” is undefined, and the proposition that UNPOL officers are “experts on mission” derives from the Respondent’s own issuances only, and the Tribunal cannot simply accept the Respondent’s terminology as correct and

⁶ For example, in paragraph 30.

⁷ DPKO/PD/2006/00135 (29 June 2007), paragraph 13.

definitive. Whilst guidelines can help to interpret a given situation, they cannot bind the Tribunal that is sovereign in interpreting rules and regulations and applying them to a given factual situation. The same goes for the report of the Secretary-General to the General Assembly. What the Secretary-General tells the General Assembly is his own view. In the absence of a resolution endorsing that view, the views of the Secretary-General are not binding on the Tribunal. Thus the Tribunal must look at the reality of the relationship between the Applicant and the Organization and make a determination as to whether or not an employment contract exists between them.

29. This is not straightforward, but rather a “question of fact and degree”.⁸ Assistance in formulating a test can be derived from common law jurisdictions, where a number of indicia have been identified over the years to assist in the determination of employee status. The principle tests that seem applicable to the present situation appear to be assessing the degree of control of the ‘master’ over the ‘servant’;⁹ the degree of ‘integration’ of the Applicant into the organization;¹⁰ the payment of wages or other remuneration;¹¹ the powers of selection and dismissal.¹² In this regard, paragraph 58 of the Guidelines stipulates that:

[a]ll emoluments and other entitlements from Member States should continue to be paid and/or provided to United Nations Police Officers as if they were serving in their own country.

30. UNPOL recruitment is administered by the Police Division of the Department of Peacekeeping Operations (DPKO). From the information set out in the Guidelines, it seems that the United Nations Selection Assistance Team assists and advises police contributing countries in selecting national police and other law enforcement personnel to serve as UNPOL officers, however “it is understood that the provision of well-equipped, pre-inducted and disciplined police and other law enforcement personnel to United Nations peacekeeping operations is the collective responsibility of all Member States”.¹³ It seems therefore that the

⁸ *O’Kelly v Trusthouse Forte* [1983] IRLR 369, 382, per Sir John Donaldson MR.

⁹ *Park v. Wilsons and Clyde Coal Company Ltd.*, (1928) S.C. 1211, 159.

¹⁰ *Stevenson, Jordan and Harrison v. Macdonald and Evans*, [1952] 1 TLR 101.

¹¹ *Short v. J. and W. Henderson Ltd.*, (1946) 62 T.L.R. 427, 429, HL.

¹² *Id.*

¹³ *Guidelines*, paragraph 43.

primary selection process is undertaken by the contributing countries, not the United Nations, although the ultimate decision making rests with the latter. This rather hybrid situation has no doubt left a vacuum as to the remedies that an individual like the Applicant may resort to in case of dispute.

31. And what of ‘dismissal’? Can the United Nations Organization dismiss an UNPOL officer? The procedure for dealing with serious misconduct is set out in DPKO/CPD/DDCPO/2003/001 “Directive for Disciplinary Matters involving Civilian Police Officers and Military Observers” (the “Directive”), which provides for the investigations by an internal Board of Inquiry. Depending on the outcome of an investigation, a number of administrative actions/disciplinary measures are set out in paragraph 23 of the Directive.

32. UNPOL officers are commanded by the Head of the Police Component, who is appointed by the Secretary-General and “has the authority over and responsibility for all United Nations police activities within the mission area in support of the mission mandate”¹⁴ and “all personnel serving within the mission must follow all lawful instructions received from the Head of Mission”.¹⁵ Furthermore, “United Nations Police Officers shall not accept instructions from sources external to the United Nations”.¹⁶

33. The Guidelines specify that UNPOL officers are normally assigned for one year. Paragraph 74 states that “[e]xtension of a United Nations Police Officer’s normal tour of duty in the mission is granted as an exception and not as a matter of routine, when considered essential...” It is also indicated in the Guidelines that UNPOL officers should be deployed equipped with “recent uniforms appropriate to the climate of the mission area as well as operable firearms, ammunitions and other equipment”.¹⁷ Although their operational activities are controlled by the United Nations it is clear that UNPOL officers are kept at arm’s length from the Organization, remaining part of their national police contingent, and supplied and equipped by their Member State. They do nonetheless have to make the written

¹⁴ *Id.*, paragraph 8.

¹⁵ *Id.*, paragraph 15.

¹⁶ *Id.*, paragraph 18.

¹⁷ *Id.*, footnote 10.

declaration to discharge their functions and regulate their conduct with the interests of the United Nations only in view, which, in *Turner*, was considered indicative of the status of a staff member.¹⁸

34. Whilst the basic principle is that employment is regulated by a contract, there will be situations that override or supplement that fundamental notice. The matter is explained clearly by C. F. Amerasinghe in his work *Principles of the Institutional Law of International Organizations*, 2nd ed., (Cambridge University Press), at page 282:

The view accepted now is that, while the employment relationship is based on contract, there are certain elements which are statutory, irrespective of the agreement of the parties, and further that it is not only analogies from the private law of contract that are relevant to the employment relationship but such analogies are in certain instances modified by public law concepts which exist in the law governing civil service of many states. The main difference in effect between his view (qualified contract) and the view that employment is totally governed by contract is that, where the employment relationship is partly contractual and partly statutory, statutory elements may govern the employment relationship even though they are not incorporated in the contract of employment. Further the power to alter terms and conditions of employment may be different in the two cases. The principal differences between the possible statutory and contractual basis of employment relate to the legal manner in which the employment relationship is created and may be dissolved and the relevance of contractual terms to the employment relationship.

35. The conclusion is that the Applicant is not a staff member within the meaning of the rules and regulations. Given the remarks of the Secretary-General in his Note to the General Assembly (A/62/748), it seems that a gentleman in the Applicant's position is without a remedy – he has no means of challenging a disciplinary sanction imposed during his service with the United Nations. It is rather unfortunate that in spite of several reports and requests by the General Assembly to clearly establish a mechanism which individuals like the Applicant may resort to in case of dispute, such a mechanism still does not exist. The end result is that such individuals would and do come before the Tribunal in the hope

¹⁸ *Turner* UNDT/2010/170, paragraph 29.

that they will get remedy prayed for. It is worth reiterating the following observations of Judge Ebrahim-Carstens in *Di Giacomo* UNDT-2011-168:

Where rights and obligations attach, there must be an effective mechanism for resolution of disputes and for reparation of breached rights through appropriate remedies (see *Gabaldon* 2011-UNAT-120 and *Bertucci* 2011-UNAT-121, referring to “the right to an effective remedy”). The Tribunal notes, in this regard, the Universal Declaration of Human Rights, which refers to “the right to an effective remedy” and states that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial Tribunal, in the determination of his rights and obligations ...” (see arts. 8 and 10), as well as the International Covenant on Civil and Political Rights (1966), which refers to access to “an effective remedy” (art. 2.3(a)), encourages the development of “the possibilities of judicial remedy” (art. 2.3(b)), and provides that “[i]n the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law” (art. 14.1).

36. That the Applicant has no forum in which to raise his grievance is a very unfortunate state of affairs but, regrettably, the Tribunal is powerless to intervene.

Conclusion

37. In view of the established law, articles 2.1 and 3.1 of the Statute of the Tribunal, this Application is not receivable. In the circumstances, this Tribunal has no jurisdiction to entertain it.

(Signed)

Judge Vinod Boolell
Dated this 24th day of July 2012

Entered in the Register on this 24th day of July 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi.