



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/025

Judgment No.: UNDT/2014/067

Date: 19 June 2014

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

FIALA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON INTERPRETATION

Counsel for the Applicant:

George Irving

Counsel for the Respondent:

Stephen Margetts, ALS/OHRM

Introduction

1. On 6 March 2014¹, the Applicant, a staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), filed the current Application seeking interpretation of Judgment No. UNDT/2014/007, which was rendered by the United Nations Dispute Tribunal (the Tribunal) in Nairobi on 28 January 2014.

2. The Application was served on the Respondent on 25 March 2014 and in accordance with article 30 of the UNDT Rules of Procedure, he was granted 30 days to submit his comments.

3. The Respondent filed an appeal of Judgment No. UNDT/2014/007 on 31 March 2014 with the United Nations Appeals Tribunal (UNAT), which was served on the Applicant on 3 April 2014.

4. The Respondent submitted his Reply to the Application for Interpretation on 22 April 2014.

Facts

5. The Applicant joined the Organization in Vienna in 1979. She joined the United Nations Mission in Sierra Leone (UNAMSIL) on 16 February 2000 at the FS-4 level and served there until 31 December 2005 at the same level, when the Mission closed.

6. While employed at UNAMSIL, she applied through the GALAXY system to a generic Vacancy Announcement, VA-05-ADM-PMSS-408823-R-Multiple D/S (VA 408823), issued on 22 December 2005, for an Administrative Assistant at the FS-5 level with the Department of Peacekeeping Operations (DPKO), and was technically cleared by the Office of Human Resources Management (OHRM) on 26 February 2006.

¹ The Application was initially filed into Case No. UNDT/NBI/2010/047, which was closed on 28 January 2014.

7. From late 2005, UNAMSIL was downsizing to transition to the follow-up mission, the United Nations Integrated Office in Sierra Leone (UNIOSIL). UNAMSIL requested that the Personnel Management Support Service (PMSS) at United Nations Headquarters in New York provide re-assignments for their staff to other DPKO missions in accordance with a Master List for Redeployment.

8. In response to the Applicant's application and technical clearance in GALAXY, she was called for an interview in mid-April 2006 for the vacant FS-5 Administrative Assistant post in the Office of the Regional Administrative Officer (RAO) by the Programme Manager and RAO (Region One) and the Field Office Manager, MONUC.

9. By an email dated 28 April 2006, the Programme Manager/RAO informed the Offices of the Director of Administration (DOA) and Personnel in MONUC that the Applicant was the selected candidate and recommended recruitment at the FS-5 level and simultaneously requested that Personnel speed up the process in order to avoid a break-in-service.

10. Upon receipt of the Letter of Appointment from PMSS, the Applicant noticed that she was offered a lateral move (FS-4) and immediately called the then Team Leader, Recruitment and Placement Section/PMSS and the Programme Manager/RAO in MONUC to inform them of the apparent error.

11. The Recruitment and Placement Section Team Leader informed the Applicant that she featured on a list of staff members to be re-assigned and had been processed as a lateral move as a result of the downsizing of UNAMSIL. The Applicant informed him that she had successfully gone through a competitive selection process for an FS-5 level post. He offered to re-visit her case.

12. The Programme Manager/RAO advised that the most expedient way to deal with the matter was for the Applicant "to sign the Letter of Appointment with her present grade and level, and take up the matter once she was in MONUC".

13. A facsimile of 9 May 2006 from the DOA/MONUC, to the then Officer-in-Charge (OiC), PMSS, stated that the Applicant was interviewed and recommended for appointment against an FS-4 position of Administrative

Assistant. The fax highlighted that as UNAMSIL could not maintain her status beyond expiration of her accumulated leave, she should be given the Offer of Appointment with MONUC at the earliest time to avoid a break-in-service.

14. On 17 May 2006, the Applicant signed a contract offer for a fixed-term appointment as Administrative Assistant at the FS-4, step 10 level. The Applicant joined MONUC on 1 June 2006.

15. On 7 September 2006, the Programme Manager/RAO wrote to the then Chief Civilian Personnel Officer (CCPO), MONUC, requesting advice on the steps to be followed in order to rectify the Applicant's recruitment level from FS-4 to FS-5.

16. On 26 September 2006, the Programme Manager/RAO was informed by the International Staff Recruitment Unit of MONUC that the Applicant was on a shortlist of technically cleared candidates to be evaluated for the post of Administrative Assistant at the FS-5 level in relation to VA 408823. The shortlist of technically cleared candidates was attached to the email.

17. On 27 September 2006, the Programme Manager/RAO received an email from the International Staff Recruitment Unit, MONUC, indicating that he should complete a comparative evaluation sheet to enable the Applicant to be regularized.

18. On 28 September, the OiC Africa II, Field Personnel Division of the Department of Field Support (FPD/DFS), sent a memorandum to the Applicant indicating that upon a review of her personnel records, he wished to confirm that the selection fax received from MONUC was for a post at the FS-4 level and that she was properly recruited at the FS-4 level.

19. During the following 10 months, the Applicant attempted informally to rectify her recruitment level from FS-4 to FS-5. By memorandum dated 15 April 2007, the Applicant officially requested revision/correction of her entry level. This was within a year of her recruitment to MONUC on 1 June 2006.

20. The Applicant received a response from FPD/DFS on 28 September 2007 stating that she had been properly recruited at the FS-4 level.

21. In a facsimile dated 22 February 2009, the Director of Mission Support (DMS), MONUC, requested that the Chief of Operations, FPD/DFS, revisit the case based on new evidence that was adduced by the Applicant from archived files of individuals involved in her recruitment process that suggested there was an administrative error in her recruitment.

22. An unsigned facsimile dated 27 February 2009 from FPD/DFS to the DMS/MONUC states that after careful review of the relevant recruitment material, FPD could not grant the Applicant's request as she had been properly recruited at the FS-4 level.

23. According to the Applicant, while MONUC was pursuing her case with FPD/DFS in 2009, she authorized the former Panel of Counsel to also raise the matter with FPD/DFS, which resulted in four months of silence.

24. By an e-mail dated 29 June 2009, a representative from the Panel of Counsel informed her that FPD/DFS had confirmed that it was not in a position to revise her recruitment level as she had, in fact, been interviewed and selected for an FS-4 position in 2006.

25. The decision not to revise the Applicant's grade was taken by FPD/DFS on 29 June 2009 and the Applicant was notified the same day by the Panel of Counsel. The decision was orally communicated by the OiC, Africa II Section, Field Personnel Operational Services, FPD/DFS.

26. The Applicant filed an Application with the Dispute Tribunal on 1 April 2010 contesting the decision not to revise her recruitment level from FS-4 to FS-5 with effect from 1 June 2006 when she was appointed to the then United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUC). This application was registered in the Tribunal's records as Case No. UNDT/NBI/2010/047.

27. On 28 January 2014, the Tribunal found in Judgment No. UNDT/2014/007, in Case No. UNDT/NBI/2010/047, that although the Applicant had accepted appointment at the FS-4 level, she should have been appointed at the FS-5 level in light of the fact that she had been interviewed, selected,

recommended and informed of her selection for a post at the FS-5 level. The Tribunal concluded that the decision to appoint her at the FS-4 level was erroneous and ordered: either rescission of the contested decision or payment for loss of earnings at the FS-5 level from 1 June 2006 to the date of the judgment in the event that rescission is not possible; and a payment of USD10,000 for moral damages.

Applicant's submissions

28. In the current Application, the Applicant specifies that she is not contesting her selection but is rather requesting a correction of her recruitment level following the selection exercise. In this respect, she is seeking clarification from the Tribunal of the meaning of paragraphs 85 to 87 of Judgment No. UNDT/2014/007.

29. She also seeks clarification from the Tribunal that the order in paragraph 86 of its judgment includes certain emoluments.

30. With respect to paragraph 87 of the judgment, she is seeking clarification that term "loss of earnings" is included in all the entitlements she listed in her application and with respect to paragraph 90, she is seeking that the Tribunal specify that the award of USD10,000 is intended to cover moral damages specifically related to stress.

Respondent's submissions

31. The Respondent submits that the Application was filed prematurely as it was filed prior to the expiration of the time limit for filing an appeal of the judgment. Additionally, he asserts that the Application is not receivable because he filed an appeal against Judgment No. UNDT/2014/007 on 31 March 2014 and that the Judgment is now "under consideration" by the United Nations Appeals Tribunal (UNAT).

Considerations

32. This is an Application for the interpretation of Judgment No. UNDT/2014/007 issued by the Tribunal on 28 January 2014. Article 12.3 of the UNDT Statute reads:

Either party may apply to the Dispute Tribunal for an interpretation of the meaning or the scope of the final judgement, provided that it is not under consideration by the Appeals Tribunal.

33. Article 30 of the UNDT Rules of Procedure sets out the procedural requirements for such an application and it reads:

Either party may apply to the Dispute Tribunal for an interpretation of the meaning or scope of a judgement, provided that it is not under consideration by the Appeals Tribunal. The application for interpretation shall be sent to the other party, who shall have 30 days to submit comments on the application. The Dispute Tribunal will decide whether to admit the application for interpretation and, if it does so, shall issue its interpretation.

The legal requirements

34. There are two stages in the procedure for the interpretation of a judgment. First, it must be determined whether it is receivable and secondly if it is receivable whether it should be interpreted. It will be noted that, unlike the provisions relating to an application for a revision of a judgment provided for by article 12.1 of the Statute and article 29 of the Rules of Procedure of the Tribunal, where an application for revision must be filed within 30 days of the discovery of a decisive fact unknown to the Tribunal or to an applicant or one year from the date of the judgment, no such time requirements apply to an application for the interpretation of a judgment.

35. However given that the time for appealing a judgment is 60 days a prudent party would file an application for interpretation within the shortest possible delay the more so as the application needs to be served on the other party who has 30 days to respond. At times it may be relevant and useful for an interpretation to be

given so that a party has a proper grasp of a judgment or parts of it that are not clear to that party, leaving him/her to choose whether to go on appeal or not. A party who has procrastinated may well fall foul of the deadline for an appeal. That party would be well advised to file the appeal even if he/she has filed a request for interpretation.

36. Should the filing of an appeal be taken to mean that it is under consideration and therefore debar an applicant from an interpretation? When an appeal is filed it lies with the registry of the appellate court and may be withdrawn at any moment by the appellant. The filing of an appeal itself comprises of the notice of appeal stating the grounds on which a final judgment of a first instance court is being appealed. It is the initial step in the appeals process. And there can be no appeal if a notice of such an appeal has not been filed according to existing procedural requirements. At that stage therefore the appeal is not being considered by the appellate court. The filing of an appeal is only a procedural requirement imposed on a party whereas the consideration of the appeal is the stage at which the appeal is being reviewed substantively by the appellate court. It would be a mockery of the right conferred on a party to request for an interpretation of a judgment if the mere filing of an appeal by the other party would result in the denial of the right to ask for an interpretation. This could not have been the intention of the framers of the law on requests for interpretation and appeals.

37. The Tribunal therefore holds that the mere filing of an appeal against a judgment by one party to a case constitutes no legal impediment to the other party filing for an interpretation. The objection of the Respondent is ill-conceived and is rejected.

38. The next step is to determine whether there is any justification or cogent reason to proceed to an interpretation on the issues raised by the Applicant.

The interpretation issues

39. The Applicant is requesting the Tribunal to interpret paragraphs 85 to 87 and 90 of the judgment. Paragraphs 85 to 87 read:

85. Pursuant to Article 10 of its Statute, the Tribunal may rescind a contested administrative decision and order specific performance. In cases of appointment, promotion or termination it must set an amount of compensation the Respondent may pay in lieu of rescission or specific performance. Article 10.5(b) provides for an order of compensation which, in exceptional cases, may exceed the equivalent of two years net base salary.

86. The Tribunal orders rescission of the decision to appoint the Applicant at the FS-4 level and orders the Respondent to re-appoint her at the FS-5 level with immediate effect and also orders that the Respondent pay the Applicant the difference between the salary and entitlements of an FS-4 and FS-5 from 1 June 2006 to the date of this judgment.

87. In the event that rescission of the decision is not possible, the Respondent is to pay the Applicant for loss of earnings at the FS-5 level from 1 June 2006 to the date of this Judgment.

40. In relation to the direction of the Tribunal at paragraph 86 of the judgment the Applicant requests the Tribunal to confirm whether the following emoluments are included in the entitlements namely:

a. Earnings:

Gross Salary

Post Adjustment

Dependency Allowance

Hardship element of mobility and hardship allowance

Mobility element of mobility and hardship allowance

Non-removal element of mobility and hardship allowance

Non-Family hardship element of Mobility and Hardship Allowance

Entitlements will be adjusted commensurate to steps in grade starting at the appropriate step level for FS5 that should have been in place since 1 June 2006

b. Deductions Benefits:

Rental Subsidy

Staff Assessment

Staff Member's Pension

Medical Insurance Contribution

c. Pension Entitlements

d. Whether paragraph 86 entails payment of contributions to the Pension Fund for the period covered. The Applicant will retire at the FS-5 level, at the appropriate step adjusted for time in service, and the monthly pensionable remuneration will be based on the past 8 years on re-calculated FS5 monthly pension contribution.

41. In relation to paragraph 87 the Applicant seeks confirmation from the Tribunal that this paragraph is intended to include the term “loss of earnings” in all the entitlements listed above.

42. In relation to paragraph 90 of the Judgment where the Tribunal made an award of USD 10,000 as moral damages the Applicant wants clarification whether the amount relates specifically to stress.

43. In paragraphs 86 and 87 the Tribunal has made a finding, general in nature, on the entitlements that should be paid to the Applicant. In paragraph 86 the Tribunal states clearly that what should be paid to the Applicant is the difference between the salary and entitlements of an FS-4 and FS-5 from 1 June 2006 until the date of the judgment. That presupposes that the Applicant will be reinstated as a FS-5. If rescission is not possible it is the duty of the Tribunal to make an alternative award and that is encompassed in paragraph 87 where the Tribunal orders payment of loss of earnings from 1 June 2006 until the date of the judgment.

44. It is not within the purview of this judgment for the Tribunal to work out the details of how the amount awarded should be computed. No evidence was adduced on this aspect of the case and the pleadings did not specify any of the issues raised in the application for interpretation. At any rate it is not for the Tribunal to embark on an exercise that entails administrative accounting issues. This is best left to the Administration. The Tribunal concludes that the findings and awards are clear enough and the modalities for their implementation are within the province of the Administration.

45. Lastly, in paragraph 90 of the judgment the award of moral damages relate to the stress that the Applicant suffered. The Tribunal uses the word stress and considers that there is nothing else to add or interpret.

Decision

46. In view of the foregoing, the Application for interpretation of Judgment No. UNDT/2014/007 is rejected subject to the finding at paragraph 43.

(Signed)

Judge Vinod Boolell

Dated this 19th day of June 2014

Entered in the Register on this 19th day of June 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi