



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TRUDI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Lawrence Christy

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

Introduction

1. In an Application dated 13 March 2015, the Applicant contests the decision to withdraw an offer of appointment issued by the Office for the Coordination of Humanitarian Affairs (OCHA).

2. The Respondent filed a Reply to the Application on 16 April 2015. He argued that the Application is not receivable *rationae personae* as the Applicant is not a staff member of the Organization.

3. The Tribunal, in accordance with art. 19 of the Tribunal's Rules of Procedure, has determined that an oral hearing is not required in determining the preliminary issue of receivability and will rely on the Parties' pleadings and written submissions.

Procedure

4. On 4 February 2015, by Order No. 150 (NBI/2015), the Applicant was directed to file her submissions in response to the issue of receivability by 12 May 2015.

5. On 10 May 2015, the Applicant informed the Tribunal that she had addressed the issue of receivability in her Application and has no further observations.

Facts

6. On 4 June 2014, OCHA issued a one-year offer of appointment to the Applicant as a Humanitarian Affairs Officer at the P-4 level in Syria. The offer was subject to medical and security clearances, security training certificates, confirmation of diplomas and satisfactory reference checks.

7. On 10 June 2014, the Applicant accepted this offer.

8. A laissez-passer was issued to the Applicant as a United Nations official in July 2014.

9. On 6 July 2014, OCHA asked the Applicant to send various documents so that an application for a Syrian visa could be made. She submitted her visa application to the Office of the Regional Coordinator in Damascus on 6 July 2014 and was informed the next day that it had been submitted to the Ministry of Foreign Affairs.

10. On 29 October 2014, OCHA informed the Applicant that the offer of appointment was withdrawn due to the refusal of a visa by the Syrian authorities.

11. The Applicant requested management evaluation of this decision on 30 November 2014. On 20 January she received a response from the Under-Secretary-General for Management, upholding the decision to withdraw the offer and awarding compensation of one month net base salary at the P-4 step 4 level.

Respondent's submissions on receivability

12. Under its Statute, the Dispute Tribunal's jurisdiction is limited to ruling on applications filed by staff members or former staff members of the United Nations.

13. The Dispute Tribunal lacks jurisdiction to hear the Application because the Applicant is not a staff member of the Organization. Pursuant to staff rule 4.2, the effective date of appointment of a staff member is either the date he or she enters into official travel status to assume their duties or, if no official travel is involved, the date on which the staff member reports for duty. The Applicant never entered into official travel to the duty station and she never received and signed a letter of appointment, which are preconditions to being appointed as a staff member.

14. By operation of staff rule 4.2 and in accordance with the express terms of the offer, the Applicant is not a 'staff member'. She has not been appointed to the Organization. She cannot allege non-compliance with her terms of appointment for the reason that she has no 'terms of appointment' or 'contract of employment' with the Organization. She therefore has no standing to bring the instant Application before the Dispute Tribunal.

15. Notwithstanding, in very limited circumstances, the Appeals Tribunal has recognized that persons who, despite not formally acquiring the status of staff member, may nevertheless have standing in the interests of justice. The Respondent cites *Gabaldon*¹ where it was held:

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 members. 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. This may also be the case 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, i.e. no issue of importance remains to be discussed between the parties.

16. The Respondent submits that the exception only extends to “persons who are legitimately entitled to similar rights to those of staff members”. The Applicant is not ‘legitimately entitled’ to the rights of a staff member.

17. In the case of *Gabaldon*, the Appeals Tribunal contemplated two specific circumstances where a person may be ‘legitimately entitled’ to similar rights to those of staff members, namely: (i) Non-Staff members who have commenced performing services for the Organization; and (ii) Non-staff members who have satisfied all preconditions for appointment. The Applicant did not satisfy either of the two conditions.

a. First, she had not started performing any functions for the Organization. The offer was withdrawn because the Syrian authorities denied her visa application.

b. Secondly, she had not fulfilled all the conditions of and unconditionally accepted an offer of employment. It is an implied condition of any offer of appointment with the United Nations that the potential staff member has, or can obtain, a visa entitling them to work at the duty station stated in the offer of appointment. If the host country

¹ 2011-UNAT-120.

denies the potential staff member a working visa, he or she would not be permitted to lawfully work in the duty station. As the application to secure a visa for the Applicant was denied, she did not fulfil this condition and is therefore not legitimately entitled to similar rights as staff members.

18. The Respondent submits that in accepting the Management Evaluation Unit's recommendation to uphold the contested decision, the Secretary-General did not accept that a valid contract was formed between himself and the Applicant. Rather, the Secretary-General accepted the recommendation to compensate the Applicant on an equitable basis for the delay in notification. Additionally, he reserved the right to raise the issue of receivability before the Dispute Tribunal.

19. For these reasons, the Application is not receivable *rationae personae*.

Applicant's submissions on receivability

20. The Dispute Tribunal is competent to hear the application of a staff member of the United Nations. Strictly a "staff member" is one appointed by a letter of appointment but the Appeals Tribunal in *Gabalton* held that offers of appointment can create legal obligations even before a letter of appointment has been issued. It is now clear that the acceptor of an offer of appointment whose conditions have been fulfilled should be regarded as a staff member for purposes of competence of the Disputes Tribunal.

21. The Applicant submits that the Appeals Tribunal in *Gabalton* further held that access to the United Nations system of justice must be limited to persons who are legitimately entitled to similar rights to those of staff members and that this may be the case 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, that is, no issue of importance remains to be discussed between the parties.

22. In the present case, the Applicant's acceptance of the offer was unconditional. The offer contained all of the elements necessary to the conclusion of an employment contract, including functions, remuneration, and duration. Its

starting date of “as soon as possible” was precise enough and did not require further discussion. The offer letter also transmitted the United Nations Staff Regulations and Rules along with other information. Nothing remained to be discussed.

23. Even the matter of the letter of appointment was expressly removed as a condition of appointment by the statement that it would only be issued “after you report for duty”. A laissez-passer was issued to the Applicant as a “UN official” in July 2014, even before her medical clearance. In these circumstances, the intention to make a binding contract was clear. It was subject only to the conditions set out in the offer, which it is more convenient to discuss under the merits than under receivability.

Considerations

24. The legal issue arising for determination is whether the Applicant can be regarded as a staff member of the United Nations. The Tribunal must determine whether the Applicant concluded a valid contract of employment with the Organization which would grant her access to the Tribunal under arts. 2.1 and 3.1 of the Statute of the Dispute Tribunal.

25. Article 2.1 of the Tribunal’s Statute stipulates:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations: (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms ‘contract’ and ‘terms of appointment’ include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

26. Article 3.1 of the Tribunal’s Statute 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.

27. In *Gabaldon*, the Appeals Tribunal held that the legal act by which the Organization 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, this does not mean that an offer of employment never produces any legal effects. Unconditional acceptance by a candidate of the conditions of an offer of employment before the issuance of the letter of appointment can form a valid contract, provided the candidate has satisfied all of the conditions. The conditions of an offer are understood as those mentioned in the offer itself, those arising from the relevant rules of law for the appointment of staff members of the Organization, as recalled in article 2, paragraph 2 (a) of the UNDT Statute, and those necessarily associated with constraints in the implementation of public policies entrusted to the Organization².

28. The Appeals Tribunal further held that:

a contract concluded following the issuance of an offer of employment whose conditions have been fulfilled and which has been accepted unconditionally, while not constituting a valid employment contract before the issuance of a letter of appointment under the internal laws of the United Nations, does create obligations for the Organization and rights for the other party, if acting in good faith. Having undertaken, even still imperfectly, to conclude a contract for the recruitment of a person as a staff member, the Organization should be regarded as intending for this person to benefit from the protection of the laws of the United Nations and, thus, from its system of administration of justice and, for this purpose only, the person in question should be regarded as a staff member.

Finding otherwise would mean denying the right to an effective remedy before a tribunal in respect of acts of the Organization that may ignore rights arising from a contract, as stated above, which was concluded for the appointment of a staff member.

However, in accordance with the aforementioned provisions of the UNDT Statute, this opportunity must be understood in a restrictive

² At paras. 22 and 23.

sense. 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 members. 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. This may also be the case 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, i.e. no issue of importance remains to be discussed between the parties.

29. Applying the test to the present case, the Tribunal finds that the Applicant's acceptance of the offer of employment was unconditional and that the OCHA Administration expressly treated the Applicant as a staff member. As submitted by the Applicant, a laissez-passer was issued to her as a "UN official" in July 2014, even before her medical clearance. A United Nations laissez-passer is a travel document issued by the United Nations under the provisions of Article VII of the 1946 Convention on the Privileges and Immunities of the United Nations. Section 24 of the said Article VII stipulates:

The United Nations may issue United Nations laissez-passer to its officials. These laissez-passer shall be recognized and accepted as valid travel documents by the authorities of Members, taking into account the provisions of Section 25.

30. The Tribunal finds that the Applicant was legitimately entitled to similar rights as those of staff members and the Organization must be regarded as having extended to her the protection of its administration of justice system.

JUDGMENT

31. In view of the foregoing, the Tribunal decides that this Application is receivable.

(Signed)

Judge Nkemdilim Izuako

Dated this 11th day of June 2015

Entered in the Register on this 11th day of June 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi