



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/091

Judgment No.: UNDT/2016/087

Date: 22 June 2016

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MIHAI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Daniel Trup, OSLA

Counsel for the Respondent:
Nicole Wynn, ALS/OHRM
Alister Cumming, ALS/OHRM

Facts and Procedural History

1. At the time of the Application, the Applicant held a fixed-term appointment at the P-4 level and served in the capacity of a Political Affairs Officer at the United Nations Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO).

2. The Applicant previously served as an expert seconded by the Swiss Government to MONUSCO, following a Memorandum of Agreement (MOA) between MONUSCO and the Swiss Confederation, for the contribution of personnel to MONUSCO's Stabilisation Support Unit (SSU). The contract expired on 14 April 2014.

3. In February 2014, the Applicant was asked by MONUSCO whether she would be interested in a position as a Special Assistant to the Deputy Special Representative of the Secretary-General (DSRSG) for the Rule of Law.

4. On 14 February 2014, the Applicant wrote to Ms. Florence Kiwana, Administration Civil Affairs/MONUSCO:

As recommended by COS Snellen, I take the liberty to contact you regarding a recent exchange I had with DSRSG Wafy. I was recently approached by DSRSG Wafy inviting me to join his team as his Special Assistant. I have confirmed my availability to DSRSG Wafy and subsequently was advised to contact you in this perspective.

I am currently seconded by the Swiss Ministry of Foreign Affairs to MONUSCO's Stabilisation Support Unit; [SSU] this contract end (*sic*) 15 April 2014. However I was previously employed by MONUSCO as part of the SSU (from 11 October 2011 until 08 October 2013).¹

5. On 7 March 2014, the Applicant was informed by Ms. Kiwana that her recruitment was "already in motion"².

6. On 20 March 2014, the Applicant received two further offers of employment.

¹ Annex B to Application.

² Annex B to Application.

7. The first offer was for a position at the United Nations Multidimensional Integrated Stabilisation Mission in Mali (MINUSMA)³.

8. The second offer was for a position with the World Bank⁴.

9. The Applicant declined both positions in anticipation of the position with the DSRSG for the Rule of Law at MONUSCO.

10. On 10 April 2014, the Applicant received a three month offer to serve as Political Affairs Officer in MONUSCO. The offer of appointment was sent by Mr. Minhazur Rahman, Manager for On-Boarding and Separation Service Line, Regional Centre, Entebbe⁵.

11. The offer of appointment was subject to the Applicant satisfying visa requirements and being medically cleared to serve. The letter went on to state that the appointment would become effective when the Applicant reported for duty and received the formal Letter of Appointment.

12. On 14 April 2014, the Applicant unconditionally accepted the Offer of Appointment and sent a signed copy back to the Recruitment Service Centre⁶.

13. On 14 April 2014, the Applicant was certified medically fit by Dr. Swapan Kumar, Medical Officer, MONUSCO; and documentation to that effect was submitted to the Recruitment Service Centre in Entebbe on 15 April 2014⁷.

14. On 24 April 2014, the Applicant confirmed by e-mail to Ms. Marie Michelle Auréus, On-Boarding and Separation Service Line, Regional Centre, Entebbe that she had submitted her expired Laissez-Passer to New York for renewal. In reply, Ms. Auréus requested that the Applicant inform her upon receipt of her new Laissez-Passer so that official travel to MONUSCO could be arranged⁸.

³ Annex C to Application.

⁴ Annex D to Application.

⁵ Annex E to Application.

⁶ Annexes E and F to Application.

⁷ Annex G to Application.

⁸ Annex H to Application, e-mail communication between the Applicant and Ms. Auréus.

15. On 5 May 2014, the Applicant sent Ms. Aurelus⁹ the requested copies of the Security in the Field Certificates.

16. On 14 May 2014, she sent by e-mail a copy of her previous contract as a seconded Expert to Ms. Aurélus¹⁰.

17. On 6 June 2014, the Applicant received notification that she had been shortlisted for another position with MINUSMA. As the Applicant had contractually consented to her engagement with MONUSCO, she withdrew her candidacy with MINUSMA¹¹.

18. The Applicant made repeated requests for updates to MONUSCO on her recruitment status on 19 May 2014, 10 June 2014, 23 June 2014 and 10 July 2014 by e-mail¹². No reply was forthcoming.

19. In late July 2014, the Applicant received a telephone call from Ms. Ilene Cohen, Chief of Staff to the DSRSG of MONUSCO. Ms. Cohen informed the Applicant that the Offer of Appointment was void on the basis that she had previously worked as a Seconded Expert with MONUSCO. As a result, Ms. Cohen stated, the Applicant was not eligible for employment with MONUSCO for six months after completion of her contract with the Swiss Government.

20. On 14 August 2014, the Applicant submitted a request for management evaluation.

21. The Management Evaluation Unit did not respond to the request.

22. On 9 October 2014, the Applicant filed the present Application and seeks compensation for moral damages in the amount of three months net based salary at the P-4 step 5 level together with 24 months net based salary at the same level for loss of opportunity.

⁹ Annex I to Application.

¹⁰ Annex J to Application.

¹¹ Annex K to Application.

¹² Annex L to Application.

Submissions

Applicant's submissions

23. The Applicant submits that the Offer of Appointment from MONUSCO and the subsequent correspondence, most notably from the Recruitment Service Centre, contained all the essential terms of the agreement.

24. The Applicant accepted this Offer of Appointment unconditionally and satisfied all the conditions listed in the Offer.

25. The Offer of Appointment, and the accompanying documents, contained all the essential terms and conditions of the agreement; it specified the exact position, duration, level/step, department and duty station of the employment. This Offer of Appointment was accompanied by multiple other documents including but not limited to General Information on Conditions of Service, Pensionable Remuneration and Medical Insurance.

26. The only missing condition in the Offer of Appointment was the date the Applicant was supposed to begin duty. However, as evidenced in Annex H, this date was simply dependent on when the Applicant would receive her Laissez- Passer. In other words, the Applicant was to start as soon as the Respondent cleared her for official travel.

27. On 14 April 2014, the Applicant signed, and submitted her unconditional acceptance of the Offer of Appointment.

28. The Applicant cooperated in good faith and responded to further requests in a timely manner on every occasion when the Respondent required additional documentation. At no time during this ongoing administrative process was the Applicant informed there were any actual or potential obstacles to her formally joining MONUSCO.

29. Following her acceptance of the Offer of Appointment, the Respondent had the obligation to provide the Applicant a formal Letter of Appointment upon entry on duty.

30. The valid contract between MONUSCO and the Applicant obliged the Respondent to organise her travel to the duty station, following which, a Letter of Appointment was to be issued to the Applicant.

31. The Respondent's failure to perform on his contractual obligations "was due to its complete misunderstanding of the regulations governing Temporary Appointments". This was not an external event which could lead to the contract being considered frustrated.

32. The Respondent entered into a contractual obligation regardless of the United Nations Staff Rules governing Temporary Appointments. In the bilateral agreement between the Applicant and the Respondent, the principle of *pacta sunt servanda* should apply.

33. Therefore if the contract concluded between the Respondent and the Applicant runs contrary to individual regulations, it is the contract which must have supremacy. This view is supported by other Administrative Tribunals such as the Council of Europe, which held in *Keller v Secretary General*¹³,

Under general legal principles recognised in international case-law, in particular the principle of good faith, the Organisation is required to honour any undertakings it has given.

34. It can be inferred from the e-mail sent by the Respondent on 14 May 2014 requesting the Applicant for a copy of her seconded contract that the Respondent realised its mistake. Rather than immediately notifying the Applicant of the mistake, the Respondent instead went silent and took no action. No effort appears to have been made to contact the Applicant or respond to her reasonable and timely requests for information.

35. Such inaction on the part of the Respondent demonstrates a complete lack of administrative responsibility. Indeed the Dispute Tribunal's case law emphasises the obligation on the Respondent to treat its staff members with due diligence and fairness.

¹³ Council of Europe, Appeal No. 188/1994, § 52.

36. The Applicant clearly had alternative opportunities for employment during this period which she gave up in order to maintain her unequivocal commitment to MONUSCO. At the time of refusing alternative employment, she had no reason to believe that the Respondent would not honour its contractual obligations towards her in MONUSCO.

37. The subsequent violation of the Organization's contractual obligations meant that the Applicant incurred a loss of opportunity that represents a separate yet distinct head of damages.

Respondent's submissions

38. The Application is not receivable *rationae personae*. At no point during the events leading up to the contested decision was the Applicant a staff member of the Organization. During the relevant time, the Applicant was employed as a consultant with the Swiss Federal Department of Foreign Affairs, which had offered her services to the Organization as type II *gratis* personnel in accordance with the MOA.

39. In exceptional circumstances, despite the express terms of the Dispute Tribunal's Statute, the United Nations Appeals Tribunal has accepted jurisdiction over claims brought by persons who 'formally are not staff members' but 'who are legitimately entitled to similar rights to those of staff members'. This exception is inapplicable to the Applicant as she could not legally be appointed to the temporary position.

40. On the merits, the decision to not appoint the Applicant was lawful. The Offer was not legally valid. It was void *ab initio* because, under its own terms, it could not be fulfilled. Under the legal framework of the Organization, the Applicant could not be appointed as a staff member to the Organization, having served as type II *gratis* personnel within a six month period. The Offer, on its own terms, prohibited the Applicant's appointment. Had the Organization proceeded and appointed the Applicant, it would have contravened General Assembly resolutions 51/226, 51/243 and 52/234 and Administrative Instructions

ST/AI/1999/6 (Gratis personnel) and ST/AI/2010/4/Rev.1, (Administration of temporary appointments).

41. When the Respondent became aware that the Offer was made in error, the Applicant was notified that the Offer was invalid, prior to being appointed. Further, the Offer expressly provided that it would only become effective when the Applicant reported to duty and signed a formal letter of appointment. This precondition was not fulfilled for the simple reason that it would have contravened the law.

42. The Application should be dismissed.

Considerations

Receivability and Merits

43. The Application is receivable for the reasons that are given below.

44. The issue in this case is whether there was a valid offer of appointment, which was subsequently withdrawn on grounds that the Applicant was not eligible to be appointed as she had served as a *gratis* personnel with MONUSCO.

45. In matters of employment, a distinction is made between an actual offer and the letter of appointment setting out the terms and conditions of the employment. The offer of appointment is the first step in the employment relationship and an employer would need to know whether the offer is accepted before a formal appointment is made. The actual appointment is the “the legal act by which the Organization legally undertakes to employ a person as a staff member”¹⁴. That legal act is “a letter of appointment signed by the Secretary General or an official acting on his behalf”¹⁵.

46. In *Gabaldon* 2011-UNAT-120, the United Nations Appeals Tribunal (UNAT) has laid to rest the proposition that an offer of appointment has no effects. The Court held that,

¹⁴ *Gabaldon* 2011-UNAT-120.

¹⁵ *Ibid.*

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 Respondent 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... which was concluded for the appointment of a staff member.

47. What does the reference in *Gabaldon* to an “offer of employment whose conditions have been fulfilled and which has been accepted unconditionally” mean? The Court goes on to explain as follows:

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 Organization¹⁶.

48. Were all the conditions fulfilled in the offer of employment made to the Applicant?

49. The Applicant was approached by MONUSCO enquiring as to whether she would be interested in a position as a Special Assistant to the DSRSG for Rule of Law within MONUSCO. It was following that encounter that an offer was made to her.

50. In her correspondence to Ms. Kiwana on 14 February 2014, the Applicant made it clear that she was at the time seconded by the Swiss Ministry of Foreign Affairs to MONUSCO’s Stabilisation Support Unit, and that that contract would end on 15 April 2014. The response she got to her email was that her recruitment

¹⁶ *Ibid.*

was “already in motion”. At no time did the Respondent inform the Applicant that she was not eligible as she could only be employed six months following the expiry of her tenure with MONUSCO as a seconded officer of the Swiss Government.

51. It was only in late July, five months after the offer of appointment was made, that she was informed that she could not be appointed. The Respondent submits that this was an error which he has the authority to rectify.

52. This submission is not entirely correct. The Respondent realised that issuing a letter of appointment would be contrary to section 6.3 of ST/AI/1999/6 which reads: “Gratis personnel may not apply for or be appointed to posts in the Secretariat for a period of six months after the end of their service”.

53. A request was made for a waiver of section 6.3 of ST/AI/1999/6 to “[F]acilitate the Immediate On-Boarding of Gratis Personnel”. It is dated 4 June 2014 and is addressed to Mr. Chhaya Kapilashrami, Director, Field Personnel Division (FPD); copied to Mr. Chaste Abimana, Director, Field Personnel Division; Mr. Paulin Djomo, Chief of East and Central African Section; Mrs. Larissa Hill, Human Resources Officer, East and Central African Section FPOS/FPD/DFS and Mr. Elker Buitrago Desk Officer, FPOS/FPD/DFS. The request for a waiver was drafted by Susan King, Human Resources Assistant and authorized by Francisca Kwasa and sent through Daniel Thomas Dale, Chief Human Resources Officer.

54. The request for waiver reads:

1. Request is hereby made for a waiver to the provisions of Sec.6.3 of ST/AI/1999 dated May 1999 on Gratis Personnel that prohibits the selection and hiring of Gratis Personnel before they have completed their assignment and taken a six (6) month break service.
2. MONUSCO has a Memorandum of Agreements with the Swiss Federal Department of Foreign Affairs/Directorate of Political Affairs and NORDEM, the Norwegian Centre for Human Rights regarding Gratis Personnel.
3. The RSCE has refused to process the on-boarding of two (2) candidates selected by MONUSCO for the Stabilization Support

Unit (SSU) and the office of the Deputy Special Representative of the Secretary-General. (O/DSRSG), Rule of Law/Ops East as the selected candidates are classified as Gratis Personnel and were currently with MONUSCO.

4. The SSU is currently comprised of personnel provided by Member States who encumber MONUSCO posts. Two (2) personnel at the P-3 and P-4 levels were recruited via a TVA with contracts that expired in October and November 2013. In early 2014, another accepted a TJO at UNHQ and another reached the end of their JPO contract. Therefore, in the space of a few months, at a time when the Government of the DRC and the International Community expect critical outputs from the SSU key personnel separated from the Mission.

5. From October 2013 onwards, FPD and HR-Kinshasa developed new TORs and obtained approval to initiate recruitment for the vacant P-3 and P-4 posts to replace the Gratis Personnel. The entire recruitment process has proven to be cumbersome as “Stabilization, as part of a functional job title, is not recognized by OHRM. In January 2014, and after numerous options were explored (including a RfR, PJSO, and TJO), the Mission finally was able to initiate recruitment to fill the vacant budgeted SSU posts.

6. In early February 2014, a TJO was posted on iSeek for the recruitment of Stabilization Coordination Officers, P-3. A TJO was also posted to fill the post of a Political Affairs Officer, P-4.

7. [Redacted] was selected for one (1) of the Stabilization Coordination Officer, P3 posts [Redacted].

8. [The Applicant] was selected for the Political Affairs Officer P-4 post. [The Applicant] had a contract with the Swiss Federal Department of Foreign Affairs. This contract expired on 14 April 2014.

9. During the pre-recruitment formalities of the selected candidates, the issue of Gratis Personnel surfaced and resulted in email exchanges amongst the respective stakeholders on the Mission’s selection decisions of such candidates (Gratis Personnel) given the critical recruitment requirements and the fact that communication of the offers to the selected candidates and their verbal acceptance had already taken place.

10. To complete the requirement process of the selected candidates, MONUSCO seeks your support to facilitate the solicitation of a waiver to allow the immediate on-boarding of the selected candidates, who are serving, or did serve recently, as Gratis Personnel with MONUSCO. We are mindful that there may be a risk of lengthy and damaging litigation if an exception cannot be considered under the circumstances of these two (2) recruitment cases.

55. Rule 12.3(b) of the United Nations Staff Rules and Regulations empowers the Secretary-General to make exceptions to them. Rule 12.3(b) reads:

Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

56. The rationale behind such a provision is quite obvious. A rigid application of the rules may in some circumstances result in a paralysis of the mandate of the Organization, especially in difficult locations where, very often, urgent action may be required thus necessitating the appropriate staff and logistics.

57. In the present matter, the authors of the waiver set out the reason for the request in clear and unequivocal terms. The critical reason is set out in paragraph 4 of the request and is repeated here for the sake of clarity and it reads:

The SSU is currently comprised of personnel provided by Member States who encumber MONUSCO posts. Two (2) personnel at the P-3 and P-4 levels were recruited via a TVA with contracts that expired in October and November 2013. In early 2014, another accepted a TJO at UNHQ and another reached the end of their JPO contract. Therefore, **in the space of a few months, at a time when the Government of the DRC and the International Community expect critical outputs from the SSU key personnel separated from the Mission.** (Emphasis added).

58. It is clear that it was imperative at the relevant period to have the qualified personnel on board to fulfil the Mission's mandate. It is also clear that during the pre-recruitment period, the officials in MONUSCO were alerted to the Applicant's status and one other candidate, with both candidates not having satisfied the six-month period rule.

59. This was not a mere error as the Respondent submits; inasmuch as the authors were fully alive not only to the crucial need to on-board the Applicant, but also to the legal difficulties that might arise if the waiver was not to be granted.

60. MONUSCO officials made it clear that they were “mindful that there may be a risk of lengthy and damaging litigation if an exception cannot be considered under the circumstances of these two (2) recruitment cases”.

61. The act of requesting the waiver following the issuance, and acceptance, of the offer of appointment formed part of a continuum of events which should properly have led to the Applicant being appointed to the position she was sought out for.

62. The Tribunal finds that there was a valid offer of employment made to the Applicant. That being so, the Applicant acquired the status of an individual entitled to seek redress before the Tribunal. This is what *Gabaldon* decided where it was held:

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 (emphasis added).

63. For the above reason the Application is receivable.

64. There was a valid offer of employment which was subsequently withdrawn, so the Applicant is entitled to monetary compensation. It should be noted that the Applicant turned down two offers of employment at the World Bank and at MINUSMA.

65. Article 10.5 of the UNDT Statute provides: As part of its judgement, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision of specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute

Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

66. The compensation that may be awarded under Article 10.5(a) is an alternative to the “concrete remedy of specific performance”¹⁷.

67. In the present case it would seem that the decision not to appoint the Applicant would not be rescinded. In the circumstances as an alternative the Tribunal awards the Applicant 18 months’ net base salary at the P4, step 4 level, as *per* the Statement of Emoluments that accompanied the Offer of Appointment, in *lieu* of rescission of the impugned decision, and for loss of opportunity¹⁸.

(signed)

Judge Vinod Boolell
Dated this 22nd June 2016

Entered in the Register on this 22nd day of June 2016

(signed)

Abena Kwakye-Berko, Registrar, Nairobi

¹⁷ *Gakumba* 2013-UNAT-387.

¹⁸ See *Eissa* 2014-UNAT-469.