



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/182
Judgment No.: UNDT/2017/036
Date: 29 May 2017
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AL HALLAJ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:
Daniel Trup, OSLA

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Nicole Wynn, ALS/OHRM

Introduction

1. On 21 December 2015, the Applicant, a Syrian national residing in Beirut, Lebanon, filed an application challenging the implied decision to “terminate her employment” as a Research Assistant with the Economic and Social Commission for Western Asia (ESCWA) in Beirut.

2. The Applicant is seeking compensation in the amount of 15 months’ net base salary at the GS-6 step 2 level, which includes moral damages in the amount of three months’ net base salary and 12 months’ net base salary for the breach of contract.

Facts

3. In October 2014, the Applicant applied for the position of Research Assistant at the GS-6 level with ESCWA. The vacancy announcement for this position stated as follows under the heading “*Special Notice:*”

Appointment against this post is on a local basis; candidates shall be recruited in the country of the duty station, irrespective of nationality and length of time the candidate may have been in the country. If no suitable candidate is identified, overseas candidates will be considered subject to a passing grade on the relevant entry-level examinations at the duty station.

4. On 10 August 2015, the Applicant received a written offer of employment which she accepted and returned to ESCWA on 13 August 2015.

5. On 23 September 2015, the Applicant reported for duty with ESCWA in Beirut.

6. During the check-in process and the verification of the Applicant’s documents, the Administration became aware that the Applicant, although a legal resident of Lebanon, was restricted from working in Lebanon.

7. During a meeting that took place on 28 September 2015, the Chief Human Resources Officer of ESCWA (CHRO/ESCWA) informed the Applicant that she

could no longer work for ESCWA since she did not have a work visa or permit. The Applicant was requested to turn over her security pass and leave the premises immediately which she did.

8. By email dated 5 October 2015 to the CHRO/ESCWA, the Applicant submitted a new residency permit sponsored by her aunt.

9. By email dated 16 October 2015, the CHRO/ESCWA informed the Applicant that after consulting with the “General Security of Lebanon,” the Lebanese authorities confirmed that the Applicant’s permit was only for residency purposes and did not give her the legal right to work in Lebanon. The Applicant was only allowed to work for her aunt as her sponsor. The Administration then gave the Applicant two more weeks to submit the requested documentation.

10. On 30 October 2015, the Applicant filed a request for management evaluation contesting the decision to “suspend or terminate her contract of employment with ESCWA”.

11. On 21 December 2015, the Applicant filed an application with the Tribunal.

12. On 21 December 2015, ESCWA filled the position for which the Applicant had been recruited with another candidate from the same recruitment exercise. The candidate assumed his duties on 18 January 2016.

13. The application was served on the Respondent on 22 December 2015 with a deadline to file a reply by 22 January 2016.

14. On 21 January 2016, the parties filed a joint motion requesting suspension of the proceedings on the ground that they had made substantial progress toward an amicable settlement and expected to resolve the matter informally within 30 days. They also prayed for a further extension of the deadline for filing the Respondent’s reply to 22 February 2016.

15. The Tribunal granted the parties' motion on 21 January 2016 and extended the deadline for the filing of the Respondent's reply to 22 February 2016

16. On 19 February 2016, the Officer-in-Charge of the Management Evaluation Unit (MEU) replied to the Applicant's request noting that since ESCWA had decided to rescind the contested decision, the Applicant's request for management evaluation was moot.

17. The Applicant was not previously notified that the contested decision was rescinded.

18. On 22 February 2016, the Respondent filed his reply to the application.

19. On 22 February 2016, ESCWA offered the Applicant another Research Assistant position in the same division, at the same level, with the same job description as the one for which she was initially selected. The Applicant did not respond to the offer.

20. By Order No. 004 (NBI/2017) dated 3 January 2017, the Tribunal ordered the Respondent to provide information concerning *inter alia* the efforts that had been made, if any, to obtain a work visa for the Applicant.

21. On 3 January 2017, the Applicant filed a motion to submit additional evidence, that is, psychiatric evidence in relation to her request for moral damages which related to her failure to respond to the offer.

22. On 18 January 2017, the Respondent filed his submission in response to the Applicant's motion to submit additional evidence. He opposed the admission of the proposed evidence and requested to have the "opportunity to examine the consulting psychiatrist [...] and the Applicant" in case the Tribunal grants the motion. The Respondent also requested that he be allowed to produce his own evidence on this issue.

23. On the same day, the Respondent filed another submission in response to the Tribunal's Order No. 004 (NBI/2017). He submitted *inter alia* that ESCWA did not proceed with the request of the Applicant's work visa because she had not accepted the job offer of 22 February 2016.

24. By Order No. 013 (NBI/2017) dated 20 January 2017, the Tribunal granted the Applicant's motion to submit additional evidence and the Respondent's request to "examine the consulting psychiatrist [...] and the Applicant." The Respondent was also allowed to produce his own evidence by 25 January 2017.

25. On 25 January 2017, the Respondent filed the witness statement of Dr. Rowell, a Senior Medical Officer in the Medical Services Division (MSD) at United Nations Headquarters in New York.

26. A case management discussion took place on Thursday, 26 January 2017.

27. By Order No. 037 (NBI/2017) dated 14 February 2017, the Tribunal ordered the parties to submit a list of potential witnesses and their sworn written statements by Tuesday, 28 February 2017.

28. On 20 February 2017, the Applicant filed her own statement and the witness statement of Dr. El Khoury, her psychiatrist.

29. On 28 February 2017, the Respondent filed the witness statements of Mr. Makhmudov, Human Resources Officer at ESCWA and Ms. Coco, former Associate Human Resources Officer at ESCWA. The Respondent also resubmitted the witness statement of Dr. Rowell.

30. On 22 March 2017, the Respondent filed a motion requesting the Tribunal to order the Applicant to produce documents in support of her request for damages, including evidence of mitigation of alleged economic loss.

31. By Order No. 070 (NBI/2017) dated 23 March 2017, the Tribunal ordered the Applicant to produce documentary evidence showing: (i) that she rejected job offers

in order to take up employment at ESCWA; (ii) all efforts she made to obtain employment to mitigate economic losses; and (iii) all her earnings during the period of her contract with ESCWA.

32. On 24 March 2017, the Applicant complied with Order No. 070 (NBI/2017). She informed the Tribunal *inter alia* that she was employed under a one year contract with Al Hora group, effective 1 October 2015 with a monthly salary of USD3,000.

33. On 27 March 2017, the Applicant testified at the hearing on the merits that she performed for the full one year term of the contract and filed evidence showing incoming transfers to her account from January 2015 to September 2016 for a total of EUR25,081 as proof of income for her consultancy work.

34. By Order No. 078 (NBI/2017) dated 30 March 2017, the Tribunal ordered the parties *inter alia* to submit their closing submissions by 3 April 2017. The Tribunal also ordered the Respondent to provide information concerning the net salary that the Applicant would have earned in the position of Research Assistant at the G-6 level, step 2, with ESCWA for the period from 23 September 2015 to 22 September 2016.

35. On 3 April 2017, the parties filed their closing submissions.

36. On 5 April 2017, the Respondent informed the Tribunal that the Applicant would have earned a net salary of LBP51,963,593 in the position of Research Assistant at the G-6 level, step 2, with ESCWA for the period from 23 September 2015 to 22 September 2016.

Applicant's contentions

37. The Applicant's contentions may be summarized as follows:

- a. A valid contract of employment existed between the Applicant and ESCWA. The Letter of Offer from ESCWA, the subsequent correspondence as well as her commencement of duty on 23 September 2015 contained all the essential terms of the agreement.

b. The Applicant accepted the offer of appointment unconditionally and she satisfied all the conditions demanded by the Administration. Consequently, a valid contract was formed between her and the Administration.

c. Since no requirement for obtaining a work visa was placed on the Applicant by either the Letter of Offer or subsequent communication with the Administration, ESCWA was obligated to retain her services once selected and recruited.

d. The non-performance of the Administration's contractual obligations towards the Applicant was due to its failure to communicate an ESCWA's material requirement prior to her recruitment, specifically, that for the GS post of Research Assistant, she was required to obtain a work permit herself.

e. Given that the Applicant is a Syrian national escaping persecution, the Administration was more readily capable, pursuant to the Staff Rules, of obtaining the necessary work permit to allow her to work for ESCWA.

f. The Administration entered into a contractual obligation regardless of any domestic legislation governing work permits in Lebanon. As a result, if the contract runs contrary to individual local laws, it is the contract which must have supremacy.

g. The Applicant suffered damages due to the Administration's failure to comply with its contractual obligations and she is, therefore, entitled to compensation. The Administration failed to act with due diligence and fairness. It was for the Administration to undertake due diligence and to obtain the relevant work permit. She had a legitimate expectation of working with ESCWA.

Respondent's contentions

38. The Respondent's contentions may be summarized as follows:

a. The application is not receivable *ratione materiae* because the Applicant does not challenge an administrative decision as defined in art. 2.1 of the UNDT Statute. The Tribunal lacks jurisdiction because no final administrative decision has been taken. Preparatory decisions can only be disputed in light of the final decision.

b. ESCWA has not initiated the process to separate the Applicant from service. She has not been given any notice of termination. ESCWA's corrective action in not allowing her to work illegally does not constitute a termination of her appointment within the meaning of the Staff Regulations and Rules.

c. The Applicant's permit of residency does not authorize her to work. Therefore, she could not legally perform services for ESCWA unless the Lebanese authorities issued her a valid work visa. ESCWA gave her time to obtain the necessary work authorization. To date, she has not yet provided the Administration with a valid work permit.

d. Since the Applicant did not respond to the employment offer made to her by ESCWA on 22 February 2016, ESCWA did not request a work visa from the Lebanese authorities on her behalf.

e. ESCWA has acted lawfully and in accordance with the United Nations Appeals Tribunal (Appeals Tribunal) jurisprudence in timely correcting its error and preventing the Applicant from working illegally in Lebanon.

Considerations

39. The Applicant contests the implied decision to terminate her employment as a Research Assistant with ESCWA.

Receivability

40. The Respondent submits that the application is not receivable *ratione materiae*, because the Applicant does not challenge an administrative decision as defined in art. 2.1 of the UNDT Statute. He also claims that the Tribunal lacks jurisdiction because no final administrative decision has been taken as the Applicant had not been given any notice of termination.

41. Article 2.1(a) confers jurisdiction on the Tribunal to hear applications appealing administrative decisions that are alleged to be in non-compliance with the terms of appointment or the contract of employment. The Appeals Tribunal held in its jurisprudence that to be reviewable, the administrative decision must have “direct legal consequences” on an individual’s terms of appointment and that “[w]hat constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision”¹.

42. The Appeals Tribunal also held in *Tabari* 2010-UNAT-030 that not taking a decision is also an administrative decision because it could be a decision by implication.

43. In the present case, while the Applicant has not been given any notice of termination, the evidence shows that she was, in fact, not allowed to continue working with ESCWA as of 28 September 2015, when she was informed that she could no longer perform her duties since she did not have a work permit. On this date, the Applicant was requested to turn over her security pass and leave the premises. Therefore, the Respondent’s submission that no final administrative decision has been taken cannot be accepted because the Applicant’s contract was, in actuality, terminated by the Respondent’s decision to take her pass and to require her leave the ESCWA premises.

¹ [Ngokeng 2014-UNAT-460, para. 27, citing *Bauzá Mercére* 2014-UNAT-404, para. 18, as well as *Wasserstrom* 2014-UNAT-457] *Nguyen-Kropp & Postica* 2015-UNAT-509.

44. The Respondent also submits that the application is moot because the Applicant has been granted the relief she sought in the application and it should therefore be dismissed. The Tribunal notes that the Applicant does not request the rescission of the contested decision or her reinstatement, she only seeks compensation. Therefore, the offer made to the Applicant on 22 February 2016 to express her interest in another Research Assistant position does not render the application moot. In fact, the Applicant did not reply to the offer and was therefore never appointed to the position.

45. In light of the above, the Tribunal finds that it has jurisdiction to hear the present application and that it is receivable.

Merits

46. The Appeals Tribunal has held in *Sprauten* 2011-UNAT-111 that an offer of employment produces legal effect when the candidate for employment has met all of the conditions of the offer and has accepted it unconditionally.

47. It is not contested that a valid contract of employment existed between the parties based on the Applicant's acceptance of the offer of employment made to her by ESCWA on 13 August 2015. According to this offer of employment, the Applicant's one year contract started on 23 September 2015.

48. The evidence shows that the Applicant, who had a residency permit in Lebanon, was not previously informed by ESCWA that a work permit was required from her. This requirement was not part of the vacancy announcement to which she applied or a condition in the offer of employment. The Respondent submits that locally recruited staff are recruited in the country where the vacancy is issued and that they are either nationals or have a valid work permit in that country. However, in the present case, the Applicant was recruited and offered a position with ESCWA without prior notice to her of securing a work permit nor verification of her work permit. It was only during the check-in process and upon the Applicant's own request

to the ESCWA Travel and Visa Section to process her work permit², that the Administration became aware that she, although a legal resident of Lebanon, was restricted from working in the country. This was clearly an error on the part of the Administration for which the Applicant should not be penalized.

49. Following the meeting of 28 September 2015 whereby the Applicant was informed that she could no longer perform her duties in ESCWA, there were several email exchanges between the Applicant and the Administration in relation to the work permit. The evidence shows³ that the Applicant unsuccessfully tried to obtain a work permit from the Lebanese authorities and that the only permit that she could get was a residency permit which did not give her the right to work in Lebanon except for working for her aunt as her sponsor⁴. While the Administration gave her two weeks as of 16 October 2015 to submit a valid work permit, it did not take any action, at that stage, to assist her in obtaining the work permit. The Respondent submits that on 21 December 2015, ESCWA filled the position for which the Applicant had been recruited with another candidate from the same recruitment process and that this candidate assumed his duties on 18 January 2016. Therefore, the position for which the Applicant had been recruited was no longer available as of 21 December 2015 and the Respondent cannot claim that the Applicant's contract had not been terminated.

50. The evidence shows that it was not until 22 February 2016⁵, that is, almost five months after the meeting of 28 September 2015 and after the Applicant had filed an application before this Tribunal, that the Administration took corrective action by offering the Applicant a position similar to the one for which she had been initially selected.

51. According to the email dated 22 February 2016 from the CHRO/ESCWA to the Applicant, upon her acceptance of the job offer, the Administration would have

² Applicant's witness statement at para. 10.

³ Email dated 5 October 2015 from the Applicant to the Chief Human Resources Officer.

⁴ Email dated 16 October 2015 from Mr. Makhmodov, Human Resources Officer, to the Applicant.

⁵ Email dated 22 February 2016 from the Chief, HRMS, ESCWA, to the Applicant.

requested the necessary visa from the Ministry of Foreign Affairs (MFA) of Lebanon. However, it was not certain that the MFA would have granted her the work permit that was required. In his testimony, Mr. Makhmudov, explained that in accordance with the Host Country Agreement with Lebanon, ESCWA does not request work visas for locally recruited staff and that ESCWA had not sponsored the work permit of any locally recruited staff. However, he noted that after internal discussions on the matter, ESCWA exceptionally decided to apply for a work permit for the Applicant. In this regard, the Tribunal notes that the Applicant did not respond to the 22 February 2016 offer as she was already employed at the time and was not willing to return to ESCWA.

52. The Applicant submits that she could have been internationally recruited on a general service post in accordance with staff rule 4.5(c) which provides that:

Under special circumstances and conditions determined by the Secretary-General, staff who have been recruited to serve in posts in the General Service and related categories may be considered internationally recruited.

53. Mr. Makhmudov testified that for a staff member to be internationally recruited on a general service post, he or she should not be a resident in Lebanon. Therefore, this rule does not apply to job applicants such as the Applicant, who actually resided in Lebanon.

54. Under such circumstances, the Tribunal finds that the probabilities that the Applicant would have obtained the work permit and resumed her duties with ESCWA were, indeed, limited.

55. In light of the above, the Tribunal finds that the Applicant's contract of employment was terminated on the grounds of an error committed by the Administration for which the Applicant should not be held accountable. The decision is, therefore, unlawful.

Damages

56. The Appeals Tribunal has held in its jurisprudence that:

The Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case (*Solanki* 2010-UNAT-046 and *Goodwin* 2013-UNAT 346).

57. The Tribunal notes that the online bank records submitted by the Applicant did not show regular transfers⁶, the source of such transfers or the currency of the amount received. In such circumstances, these records cannot be accepted as convincing evidence of earnings. The Tribunal thus only considers the employment contract between the Applicant and the Al Hora group as valid evidence for the calculation of damages. Under this contract, the Applicant's monthly salary was USD3,000.

58. The Tribunal has found that the implied decision of termination was taken on 28 September 2015 and that the Administration offered a similar position to the Applicant on 22 February 2016 which the Applicant was not willing to accept. Therefore, damages are awarded to the Applicant for the period from 28 September 2015 to 22 February 2016 taking due consideration of the Applicant's earnings under the Al-Hora contract for the same period.

59. The Respondent has submitted evidence that the Applicant would have earned a net salary of Lebanese pound (LBP) 51,963,593 for the period from 23 September 2015 to 22 September 2016⁷. The Applicant's net monthly salary was therefore LBP 4,330,299. As a consequence, she would have earned a net salary of LBP 21,651,497 for the period from 23 September 2015 to 22 February 2016 (five months), which corresponds to a net base salary of LBP 20,568,923 for the period from 28 September

⁶ The dates of the incoming transfers indicated by the Applicant in her bank statement are the following: 2 January 2016, 5 February 2016, 1 March 2016, 5 April 2016, 10 May 2016, 12 July 2016, 30 July 2016 and 26 August 2016.

⁷ Respondent's response dated 5 April 2017 to the Tribunal's Order No. 078 (NBI/2017).

2015 to 22 February 2016. LBP 20,568,923 is equivalent to USD13,611.43.⁸ The Applicant's salary in the Al-Hora group for the same period was USD14,250. Therefore, the Tribunal considers that there are no compensatory damages to be awarded.

60. The Applicant requests compensation for moral damages in the amount of three-months' net base salary and 12 months' net base salary for the breach of contract.

61. The Appeals Tribunal has held in *Asariotis* 2013-UNAT-309 as follows:

An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

62. The Appeals Tribunal has constantly held that:

Damages for moral injury may arise from a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.⁹

63. In support of her claim for moral damages, the Applicant submitted to the Tribunal a medical report dated 6 April 2016 issued by Dr. Joseph El Khoury, a

⁸ Pursuant to rule 106.5(a) of the United Nations' Financial Regulations and Rules, the operational rate of exchange, as established by the Under Secretary-General for Management, shall be used for recording all United Nations transactions. Therefore, the average United Nations operational rate of exchange applicable during the period from September 2015 to February 2016 has been used to convert the Applicant's net base salary of LBP 20,568,923 into USD.

⁹ *Asariotis* 2015-UNAT 496, *Hersch* 2014-UNAT-433, *Baig, Maelstrom, Jarvis, Goy, Nicholls, Marcussen, Reid, Edgerton, Dygeus, Sutherland* 2013-UNAT-357, *Malmström et al.* 2013-UNAT-357, *Longone* 2013-UNAT-358, *Ademagic et al. and McIlwraith* 2013-UNAT-359, *McIlwraith* 2013-UNAT-360, *Andersson* 2013-UNAT-379.

licensed psychiatrist in Lebanon. The Tribunal reviewed the report submitted and considered that it is not convincing evidence of a traumatic experience that may have led to a “Post Traumatic Stress Disorder.” The Tribunal notes, in particular, that while the so called “traumatic experience” occurred on 28 September 2015, the Applicant started working in the Al-Hora group on 1 October 2015, therefore, the doctor’s diagnosis is deemed unreliable and no award of compensation will be granted in this regard.

64. During the trial, the Applicant submitted into evidence testimony that she lost an employment opportunity in the Embassy of Rwanda in Cairo because she had accepted and being appointed as Research Assistant at the G-6 level in ESCWA. The Tribunal reviewed the evidence and considers that the email dated 13 September 2015 submitted by the Applicant is, in fact, an invitation to the Applicant to express her interest in the vacancy; it was not a formal offer of employment as it does not state a position, a salary or a period of employment. Even considering that the email dated 13 September 2015 was an offer of employment, the Applicant’s email dated 20 September 2015 to the Ambassador shows that she declined the alleged offer due to personal reasons e.g. “[she was] not able to leave [her] family and [her] responsibilities ... in Beirut.” Furthermore, the Tribunal notes that by the time of the 13 September 2015 email, the Applicant had already accepted the position at ESCWA a month earlier on 13 August 2015, therefore, the Applicant’s alleged loss of opportunity has no basis.

65. Having said the above, the Tribunal finds that the manner in which the Applicant was treated by the ESCWA management deserves compensation. Indeed, the evidence shows that the Applicant was removed from her functions on 28 September 2015 without prior notice. She was requested to turn over her security pass and leave the premises immediately. She was not allowed to enter the premises without authorization and was not granted any assistance, at that stage, to obtain the required work permit. In this regard, the Tribunal finds that compensation should be awarded in the amount of one-month’s net base salary.

66. The Tribunal finds that the breach of the Applicant's contract of employment was of a fundamental nature and that, as such, it gives rise to an award of moral damages by virtue of the harm to the employee. Considering that the duration of the Applicant's appointment at ESCWA was for a year and that on 22 February 2016, she had received an offer of employment for a similar position at ESCWA, the Tribunal finds that a reasonable amount of compensation to be awarded to the Applicant is two-months' net base salary.

Decision

67. In light of the findings stated above, the application is accepted in part. The Applicant is awarded one-month's net base salary for moral damages and two-months' net base salary for breach of her employment contract.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 29th day of May 2017

Entered in the Register on this 29th day of May 2017

(Signed)

Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi